Supreme Court, U.S.
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No. 06-16

IN THE SUPREME COURT OF THE UNITED STATES

THUMBELINA BROWN,

Petitioner,

v.

MCLEOD REGIONAL MEDICAL CENTER OF THE PEE DEE, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE MCDONNELL DOUGLAS SHIFTING BURDEN TEST CAN STILL BE USED AS JUSTIFICATION FOR DISMISSAL OF A TITLE VII CASE AT THE SUMMARY JUDGMENT STAGE, IN LIGHT OF THE COURT'S DECISION FROM DESERT PALACE, INC. V. COSTA, 539 U.S. 90 (2003).

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE RECORD CONTAINS GENUINE ISSUES OF MATERIAL FACT AS TO BROWN'S PRIMA FACIE CASE OF RACE DISCRIMINATION UNDER TITLE VII AND 42 U.S.C. 1981a.

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OPINIONS BELOW

The Court of Appeals wrote an unpublished Opinion in this case on January 25, 2006, affirming based on the reasoning in the District Court Judge's Order filed on April 29, 2005. A copy of the unpublished Opinion is included in th Appendix, as is the Order of April 29, 2005.

JURISDICTION

On January 25, 2006, the Appeals Court for the Fourth Circuit affirmed the District Court's dismissal of Ms. Brown's case on Summary Judgment. This Court Has Jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

None.

STATE STATUTORY PROVISIONS AT ISSUE

None.

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STATEMENT OF THE CASE

Thumbelina Brown began working for McLeod in 1978. In the mid 1980's, Ms. Brown injured her back at work, catching a patient who was falling. The injury was clearly sustained at work and in the course of her duties, she was not compensated through workers compensation. Rather, McLeod made her exhaust her vacation and sick days, never paying worker's comp. benefits. She returned to work despite severe continuing pain when hr leave was exhausted. In 1988, Brown applied for Unit Secretary because she could no longer work as a Nurse's Aid without severe pain. McLeod offered the job to others on the floor first. Only after determining that there were not enough applicants to fill all the jobs, McLeod allowed Brown to transfer. Brown was transferred on a 60 or 90 day probation, and was not required to take the usual qualification test. She remained a Unit Secretary until her discharge in 2001.

During the late 80's and 90's, Brown was under Terry Hayes. The white Unit Secretaries (all white) were allowed preferences for scheduling ove Brown. Brown complained of race discrimination, verbally and in writing, and met with a Director to discuss her complaints, without effect. As Unit Secretary, Brown consistently received annual bonuses, and received no performance-based write ups. In May of 2000, Brown received an annual evaluation in which she was rated "Successful – Overall performance consistently meets and may occasionally exceed standards." also noted "Thumbelina has been an employee at McLeod for many years; she works well with staff and physicians; can work in all areas of her unit – GYN, L&D, PP, NBN. She is an asset to the WP; does birth certificates." In 2000, shortly after this evaluation, Brown was in an automobile accident, and suffered a broken ankle. Ms. Brown was unable to return to work

and was in a cast for about two weeks. She began physical therapy at the McLeod, and requested a leave of absence. Brown's supervisor, Hart Smith, sent Brown a memo, acknowledging receipt of a certification of absence form, requesting medical documentation, informing her of her FMLA rights, and STD options. Brown turned in a form filled out by Dr. McBryde and dated 6-12-2000. It notes that Brown is currently unable to return to work. Brown kept McLeod current on her condition, and delivered requested medical documents. McLeod sent Brown a letter, stating that she was on a leave of absence, denying FMLA leave, denying paid leave, and requiring that Brown pay premiums for continuing medical coverage from her pocket. Brown was denied STD benefits. The denial letter noted that Brown's job as Unit Secretary "requires 75% sitting, 25% typing, 20% walking, 10% lifting, 10% reaching, and 5% stooping, according to the Physical Job Evaluation

Form completed by your employer. Your job duties consist of answering telephones, ordering supplies, order entry, and chart work." Brown attempted to return to work. On 8-14-00, she submitted a form filled out by her doctor. As to whether she could work, the doctor circled both "yes" and "no," noting "cannot be on feet at work during day," "No standing or walking." Under "expected return," he wrote "depending on off feet." McLeod did not allow Brown to return to work, stating that she could not perform the essential functions of her job.

On November 23, 2000, Dr. McBryde sent a letter and spoke with a McLeod employee. According to the letter, Brown could return to work. In an 8 hour day, she was to have no walking, if possible, but if she needed to walk, she could. Brown was to walk only about 10 minutes at a time with 20 minute resting periods between walking periods. During the walking periods, she was not to lift more than 4 pounds.

McLeod still insisted that she could not perform her job.

In February of 2001, McLeod received Brown's short term disability application, which marked her as "ambulatory." On March 15, 2001, Brown got a doctor's note stating "May return to work 4-14-01 but should limit standing and walking as much as possible." McLeod claimed to be confused and refused to allow Brown to return. On 4-17-01, Brown's supervisor received a Medical certification form which stated that Brown's present incapacity would end on 4-01, though she would have a 20% permanent impairment to her right foot. Another note of 4-14-01, stated Brown could return to work. Still, McLeod claimed that Brown could not perform the essential functions of her job.

On 6-1-01, Brown brought another note. This one stated "May return to work 6-1-01 but should limit standing and walking as much as possible – please call

if you have any questions 803-434-7689 Thank you." McLeod insisted that it did not understand, but it did not call Dr. McBryde, even though he apparently called Ms. Smith, Brown's supervisor and left messages. On August 31, 2001, Dr. McBryde sent Hart Smith, Brown's supervisor, a letter, stating "The changes that have been present are now such that she will not have a vascular necrosis and will not actually damage her ankle, but it gets to be a matter of how much subjective pain she can handle. She did have a legitimate injury." McLeod continued to claim that Brown was restricted to the point that she could not perform her job. Brown asked to be allowed to come to work on a trial basis, to show that she could do the job. McLeod refused. On August 31, 2001, McLeod terminated the Brown, as of September 1, 2001.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE MCDONNELL DOUGLAS SHIFTING BURDEN TEST CAN STILL BE USED AS JUSTIFICATION FOR DISMISSAL OF A TITLE VII CASE AT THE SUMMARY JUDGMENT STAGE, IN LIGHT OF THE COURT'S DECISION FROM DESERT PALACE, INC. V. COSTA, 539 U.S. 90 (2003).

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE RECORD CONTAINS GENUINE ISSUES OF MATERIAL FACT AS TO BROWN'S PRIMA FACIE CASE OF RACE DISCRIMINATION UNDER TITLE VII AND 42 U.S.C. 1981a.

I. The Court's use of the McDonnell Douglas Shifting Burden test as a tool for analysis and final disposition of Title

VII cases at the Summary Judgment stage is counter to the congressional mandate set forth by the 1991 amendments to The Civil Rights Act of 1964.

A. The McDonnell Douglas Shifting Burden test is no longer applicable at the Summary Judgment stage in the analysis of Title VII cases.

What has become known as the "shifting burden test" derives from an affirmative defense created by the 1991 amendments to Title VII. In cases where the statute in question (like the ADEA) requires a "single motive" finding, the McDonell Douglas Shifting Burden test is still applicable. However, the congressional amendments to Title VII, and the Supreme Court's Opinion from Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), show that Title VII does not prohibit only "single motive" discrimination. The specific affirmative defense from the amendments looks like the shifting burden test to a point, but it does

not impact on liability, and can not be used as a basis for dismissal of a Title VII case. In Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), the Court discusses two amendments to Title VII. The second amendment discussed is 42 U.S.C. 2000e-2(m). This amendment clearly spells out how the shifting burden test is ***supposed*** to be used.

Congress has clearly stated that the burden shift requires the employer to "demonstrate" (produce evidence) a non-discriminatory reason for the adverse action as an affirmative defense. The statutory language *specifically calls it an affirmative defense*. 42 U.S.C. 2000e-5(g)(2)(B). The affirmative defense, if successful, would only limit damages in the case, rather than absolve the Defendant of liability. The available remedies include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs." 42 U.S.C. 2000e-5(g)(2)(B).

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B. The use of the Shifting Burden Test is counter to the clear and unambiguous language of Title VII, as amended.

1. The 1991 amendments to Title VII were specifically created to overrule Price Waterhouse, the foundation of the shifting burden test.

Price Waterhouse v. Hopkins 490 U.S. 228 (1989) is the birthplace of the Shifting Burden test, though the actual test was specifically expressed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Desert Palace Court observed that "the legislative history evinces a clear intent to overrule Price Waterhouse." Desert Palace, at 850. A portion of the report accompanying the Act (titled "the need to overturn Price Waterhouse") reflects congress' concern that "the inevitable effect of the Price Waterhouse decision [was] to permit prohibited

employment discrimination to escape sanction under Title VII."Id. (quoting H.R.Rep. No. 102-40(I), at 46 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 584). The report continued: "[T]he effectiveness of Title VII's ban on discrimination on the basis of race, color, religion, sex, or nation origin has been severely undercut by the recent Supreme Court decision in Price Waterhouse v. Hopkins." Id.

C. The decision from Raytheon Co. v. Hernandez, in which the Supreme Court did apply the shifting burden test, is distinguishable, because the statute applied was the ADA, and not Title VII.[3]

In the Order appealed in this case, the District Court Judge rejects the argument that the Desert Palace decision affects the use of the Shifting burden test by referring to Raytheon v. Hernandez, 540 U.S. 44 (2003), and pointing out that the Supreme Court applies the Shifting burden test in that case. This case,

however, is about the ADA, not Title VII. Although the Title VII framework has been used to analyze civil rights cases under other statutes, the fact that the Court would not immediately disregard the use of the shifting burden test for the ADA does not require a finding that the Shifting Burden test still applies.

II. The record contains genuine issues of material fact as to Brown's prima facie case of race discrimination under Title VII and under 42 U.S.C. 1981a.

Brown (who is African American) essentially claims that white workers with restrictions as severe as or more severe than hers have been allowed to return to work with those restrictions, where she was not. Brown was put on leave without pay, required to pay her own benefits, denied the right to return to work, and terminated. In the Order appealed here, the Judge affirms that Brown satisfied the first three elements of her race discrimination claim, 1) that she is in a protected class, 2) McLeod took adverse employment

action against her, and 3) at the time of the adverse employment action, Brown was qualified to perform her job. The remaining element is 4) the adverse employment action occurred under circumstances which raised an inference of unlawful discrimination. St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 506 (1993).

In determining race discrimination claims, the Court must examine discriminatory treatment holistically and not atomistically. Settle v. Baltimore County 34 F. Supp.2d 969 (4th Cir. 1999). A review of the McLeod's actions and omissions shows a long pattern of McLeod subjecting Brown to unnecessarily harsh standards. She watched white employees receive the benefit of the doubt, fist choice in scheduling, Workers compensation benefits, and return to work with more severe restrictions than Brown had. A holistic view shows an African American woman, working for an institution for twenty three years

without any negative performance based notes in her record, being forced out under conditions so suspect that they give rise to a clear inference of unlawfully discriminatory motive.

A. *Disparate treatment*

Brown points to individuals who are outside her protected class, who are substantially similar to her in the aspects which are actually pertinent to the action at issue to show disperate treatment. Brown claims white workers returned to work with restrictions that rendered them either 1) unable to perform the essential functions of their jobs, or 2) with restrictions equal to or more serious than Brown's. Brown produced the names of several white workers who had been injured and allowed to work under restrictions. Some were Unit Secretaries, others were in other positions, but had obvious and visible restrictions which kept them from being able to carry out their basic job duties. The found that, of many white employees of McLeod who

Brown observed working with restrictions, only Debra Powell could be considered substantially similar as she reported to the same supervisor as Brown. Powell received part-time off as intermittent FMLA leave as an accommodation for her physical restrictions (she was restricted to working part time hours). Ms. Powell was restricted from heavy repetitive lifting or bending. Powell was not injured on the job. Lifting 50 pounds is an essential job function , as is stooping, bending, crawling, etc. Powell's restriction is at least as "unclear" as Brown's. Yet, McLeod claimed that it was unable to decipher Brown's "limit standing and walking as much as possible," although it seems to have had no trouble interpreting "heavy" in the "no heavy repetitive lifting" to mean "under 50 pounds." This does certainly show that Brown was held to a more stringent standard than Powell.

B. McLeod's assertion of pretextual reasons for denying Brown's return to work create an inference of discriminatory intent, and should be sufficient to satisfy the fourth element of the case for discrimination.

Hart Smith, Brown's supervisor, testified that McLeod perceived the Brown as unable to walk or stand at all at work due to restrictions. This is clearly contradicted by the records that Smith had received. Even Ms. Carter, the McLeod's HR specialist stated McLeod did not see Brown as completely restricted from walking, but that an accommodation for the restrictions she had must be found. McLeod insisted Brown was simply not able to perform the essential functions of her job. Yet there is clearly a genuine issue of fact as to what those activities were. Smith testified that getting trays from dietary and walking to the pharmacy were essential job functions because they were specifically listed in the Key Results Areas form, yet, a review of the form shows no such thing.

Carter claims that the McLeod decides what essential job functions are by consulting the key results areas form and the Job specification, but Smith testifies that all sorts of things that are not on the Key Results Areas form are essential job functions, only to admit minutes later, that those same functions are really "other duties" performed by anyone who can conveniently manage them at the time.

The McLeod claims to have been working very hard to try to get the Brown back to work, only to be stumped over what her doctor meant by limit standing and walking as much as possible. Yet they failed to contact the doctor to clarify, even when invited by the doctor's note. The sheer inconsistencies and blatant contradictions in McLeods' witnesses' testimony and the evidence from the job description forms shows a deliberate attempt to deceive. Where asserted reasons for taking adverse employment actions are shown to be pretextual, this is evidence that the actual motives were

discriminatory. Hill v. Lockheed Marin Logistics Management, ___ F.3d ___, 2004 WL 25018 (4th Cir. 2004). (Noting: in a Title VII case, the Plaintiff may avert Summary Judgment by showing the Defendant's asserted reasons for an action were pretextual.) It is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Reeves v. Sanderson Pluming Products, Inc. 530 U.S. 133 (2000). "Rejection of the Defendant's proffered reasons is enough at law to sustain a finding of intentional discrimination." Id.

C. Failure to abide by normal procedures or written procedures is evidence of pretext and would support an inference of discriminatory intent.

Under Fairfax Hospital v. N.L.R.B. 14 F.3d 594 (1993), the Court found that an employer's failure to follow usual or normal procedures in taking an adverse employment action against a Plaintiff can be

considered as evidence of pretext. McLeod distributed to its employees a policy concerning leaves of absence. The policy includes a "Reinstatement" provision, to which the hospital is bound. The policy states that, in most cases, McLeod will make every effort to place employees in their former positions. A reasonable juror could determine that the McLeod did not make a reasonable effort to return Brown to her position. In fact, a reasonable juror could easily determine that McLeod went out of its way to do the opposite.

D. Pretext as to denial of the Wheelchair as an accommodation supports an inference of discriminatory intent. (The Judge unnecessarily applied a substantially similar analysis, thereby failing to consider the inference to be drawn in favor of Ms. Brown).

Anthony is a volunteer who is in a motorized wheelchair permanently. Brown has observed him coming onto the floor where she works in the motorized wheelchair. In the Order appealed, the

Judge discounts the fact that Anthony was allowed on the floor with a wheelchair, where Ms. Brown was told that no motorized wheelchairs were allowed at all, by following the red herring of trying to determine whether Anthony was substantially similar to Ms. Brown. The question of whether Anthony is substantially similar has no bearing on the question of whether McLeod was lying when it claimed that no motorized wheelchairs were ever allowed on the floor on which Brown worked. Anthony's presence in the nursing hall, using a motorized scooter or wheelchair, is far from insignificant to this case as evidence of pretext, and thus evidence supportive of an inference of discrimination. McLeod told Brown that they considered allowing her to use a motorized chair to get around the hall when she needed to walk. McLeod was not laboring under the perception that the Brown could not stand or walk at all, only that, as the notes say, she was restricted to limit standing and walking as much as

possible. Brown could simply sit in her usual work chair at her station. McLeod told Brown that government regulations prohibited the use of such a chair on the hall. This assertion is rebutted by the fact that Anthony, uses one in the same area regularly.

E. Disparate treatment as pretext, and thereby, evidence supporting an inference of discriminatory intent.

One means of demonstrating pretext is to put forth evidence that employees outside the protected class who were involved in misconduct of comparable seriousness were not subject to similar adverse employment action. Hiatt v. Rockwell Int'l Corp., 26F.3d 761, 770 (7th Cir. 1994). Beyond the fact that Brown can show that Ms. Powell, (substantially similar) returned to work with restrictions as non-specific as Brown's, Brown has presented a long list of white workers she has observed at work with obvious restrictions as well as black employees, who,

like herself, were transferred or terminated rather than accommodated or returned to work. Although, some of these employees would not necessarily qualify as substantially similar, the multitude of white workers returning with injuries, combined with the instances of black workers who were not should be considered evidence of discrimination.

CONCLUSION

The 1991 Amendments to Title VII may or may not affect the application of the *McDonnell Douglas* Shifting Burden test to cases falling under other civil rights statutes (the ADA or ADEA, for example). However, there can be no question that the 1991 Amendments apply to Title VII cases, like this one. If every Title VII case is to be analyzed as a mixed motive case (which is what Desert Palace tells us), and the Shifting Burden test applies only to single motive cases (which it does), then, deductively, one must find

that the shifting burden test can never apply in a Title VII analysis.

In this case, there is sufficient evidence in the record to support a finding that Ms. Brown has satisfied the fourth element of a race discrimination claim, that there exists evidence from which an inference of discriminatory intent may be drawn. The district Court focused only on the disparate treatment argument. However, there are other ways of establishing an inference of discriminatory intent on the part of an employer. The record does contain evidence of pretext on McLeod's part, a failure to follow normal procedures, and evidence of a pattern of discriminatory treatment, all of which, if viewed holistically, create a genuine issue of material fact as to whether an inference can be drawn, that McLeod acted with discriminatory intent. If an inference in the Plaintiff's favor can be drawn, at the Summary judgment stage, it must be drawn. Ms. Brown

respectfully requests that this Court reverse the Order from the District Court and remand this case for trial.

For the reasons set forth above, Petitioner THUMBELINA BROWN respectfully prays that the Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully Submitted,

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MCLEOD REGIONAL MEDICAL CENTER OF THE PEE DEE, INC.

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

Rule 14(i)

Rule 14 (i)(i) Opinions, Orders, Findings of fact and conclusions of law entered in conjunction with the judgment sought to be reviewed

Report and Recommendation
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DEC 28 2004

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

THUMBELINA BROWN,) Civil Action No.: 4:02-3973-12BH
Plaintiff,)

-vs-) **REPORT AND RECOMMENDATION**

MCLEOD REGIONAL MEDICAL)
CENTER OF THE PEE DEE, INC.,)

Defendant.)
_____)

Plaintiff instituted this action in state court on October 29. 2002, alleging in his complaint causes of action for disparate treatment race discrimination under Title VII, 42 U.S.C. §2000e, *et seq.*, and 42 U.S,C. §1981. Defendant removed the case to this court on November 25,2002, and filed its answer on November

27, 20C2. The matter is now before the court on defendant's motion for summary judgment (Doc. #30} and supporting memorandum filed April 15,*2004.* On April 27, 2C04, plaintiff filed an opposition memorandum to defendant' s motion to which defendant filed a reply on May 7,2004. The matter is now ripe for disposition. Pursuant to Local Rule, a hearing was not held bin this matter.

FACTS

Defendant is a regional healthcare system. In August 1978, plaintiff applied for a Nursing Assistant position at defendant's hospital in Florence, South Carolina. Defendant hired plaintiff on September 12,1978, and she was assigned to work as a Nursing Assistant in the Obstetrics and Gynecology units of the hospital.

In the mid-1980's, plaintiff injured her back while at work when she tried to catch a patient who was falling. After using her sick days and leave days , she returned to work as a Nursing Assistant although she continued to experience pain in her back and legs. A position of Unit Secretary, which was less physically demanding than the nursing Assistant position, became unavailable and plaintiff told defendant that she was interested in the position. Defendant offered the position of Unit Secretary to "several people on the floor." (Plaint. Dep. At 40) Some of the people turned it down, but plaintiff accepted on October 7, 1998. (Plaint. Dep. Exh. 4). Defendant waived the testing requirement for the position during the three month probation / orientation period. After the probation/ orientation period, plaintiff remained in the position and was not required to undergo the testing

requirement. 2

On or about May 24, 2000, plaintiff broke her ankle in an automobile accident. She initially presented to defendant's emergency room. The following day she was transported to Charleston, South Carolina where Dr. Angus McBryde performed surgery on her ankle. Following surgery, plaintiff was unable to return to work and she requested a leave of absence. Id. At 114. Hart Smith, plaintiff's supervisor, sent a memo to plaintiff stating as follows.

We were sorry to hear of your accident week before last. I have tried to call you to see how you were doing but we do not have a phone number. The only number that we have is one that has been disconnected. I have received your "certificate of absence" from you but will need a "medical certification" completed as well. I have attached a copy for you and also a copy of the FMLA notice. Please remember that you must

contact

[1] Apparently, no worker's compensation benefits(were paid and she used her vacation
and sick leave while she was out.)

> Human Resources as well as the insurance company for your Short-Term disability. This must be done after 15 calendar days from your first day of absence. Please let us know if there is anything we can do for you;. Keep us informed on your progress and when we can anticipate your return to work. Once again I hope you are better and if there is anything we can do please let us know.

(Plaint, Dep. Exh..10)

Dr. McBryde completed a Medical. Certification on June 12, 2003, indicating plaintiff could not return to work and would be unable to for three months or longer. (Plaint. Dep. Exh.11). Plaintiff kept defendant current on her condition. An employee from Human Resources .sent a letter dated July 17, 2000, to plaintiff which states as follows:

> This letter is to inform your request for a medical leave of absence beginning May 26, 2000 has been approved and that your leave does not qualify for

FMLA protection. If necessary for business needs, your job may not be held for you. You will be notified by your department if that happens.

I have enclosed a copy FMLA Notice, a copy of the Non-FMLA policy, and a copy of your Certificate of Absence'(COA) for your information.

Any leave of absence that lasts for more than seven weeks (49 calendar days) will result in a change to your anniversary date by the exact length of your leave

While you are on a leave of absence, you are responsible for paying any applicable benefit premiums. If you are receiving Short-Term Disability [17] benefits or Paid Time. Off (PTO) or Grandfathered Sick Pay (GSP), " premiums will be deducted from your pay. If you do not receive a paycheck, please send your check made-out to McLeod Health to ...

As a reminder, an employee physical assessment and Annual Training are necessary before your annual performance evaluation can be completed. If this is applicable as you return from your leave of absence, please arrange to complete these requirements.

Before returning to work from a leave of absence, you must contact Human Resources, who will coordinate your return to work with your department

(Plaint, Dep,.Exh..12)

Dr. McBryde completed a Medical Certification on August 14, 2000. (Plaint. Dep. Exh. 15). He circled both " yes" and " no" in response to. whether plaintiff was currently able to work. He wrote that the physical limitations upon return to work was " no standing or walking" and that the duration of the present incapacity was indefinite, "depending on off feet."

On November 22,2000, plaintiff returned to Dr. McBryde for a follow-up .visit. During that visit, plaintiff and Dr. McBryde discussed her ability to return to work. Dr. McBryde placed restrictions on her return to work based on an eight hour day, including (1) no more than ten minutes on her feet per hour, (2) no more than five

minutes asking per hour (this is included in (1)), no kneeling, bending, (and two restriction that are illegible), and should not carry anything over 3-4 pounds during the minimal time on her feet. There also are notes written in a different handwriting indicating "no asking if possible. If walking, only 10 min at time w/ 20 min resting period." (Plaint. Dep. Exh. 16) Plaintiff took Dr. McBryde's note with restrictions to defendant because she was ready to return to work. (Plaint. Dep. At 146). Defendant told her they could not accommodate the restrictions, so plaintiff waited another month or two until she saw Dr. McBryde again. Id. at 147. Plaintiff returned to Rd. McBryde on March 19, 2001. His office note provides as follows.

> History: Thumbelina Brown is here. She is improved. She uses her cane but not as much. Her gait is smoother. Her strength is good. X-RAYS: X-rays do not suggest an avascular necrosis. The ankle joint and subtakr joint are intact. PHYSICAL EXAMINATION: She has good inversion and aversion. She can actually get on her toes. Though I am not willing to say that she will not get avascular necrosis, I do think that

she is rehabilitated to the point where she will not in any way damage or create more of a permanent problem of her foot than she now has.

She may return to work 4/14/01 but should limit standing and walking as much and walking as much possible.

(Plaint. Dep. Exh. 18)

Dr. McBryde completed another Medical Certification on April 9, 2001. (Plaint. Dep. Exh. 19). Dr. McBryde described the duration and frequency of episodes of incapacity as "intermittent pain and [increased] limp" "job cannot entail standing [and] walking." He noted a 20% permanent impairment of her right foot and that her incapacity ended on April 1, 2001. He indicated that she could return to full schedule if no standing and walking and placed the restriction of "no standing or walking as part of job." Because of these restriction, plaintiff was not allowed to return to work.

Dr. McBryde wrote a prescription for her to return to work on April 14, 2001, but she should limit standing and walking as much as possible. Id. Defendant would not allow plaintiff to return to work at the time because they wanted an explanation of "limited walking and standing." (Plaint. Dep. At 147).

After plaintiff presented to defendant the April 9, 2001. note from Dr. McBryde, she met with Hart Smith and two other employees of defendant' s Benefits Specialists, Miriam Carter and Pam Erwin3. During this meeting, they discussed plaintiff's ability to perform the job. (Plaint. Dep. at 173-74). Following this meeting, Carter, Smith and Erwin could not determine if plaintiff was capable of returning to work with Dr. McBryde's restrictions. Carter Drip. At 10-12. Therefore, Ms. Carter contacted John Zelenka, defendant's Work Recovery Manager, and asked him to perform a work site evaluation to determine if plaintiff could perform die essential functions of the Unit Secretary position with the rcstriction.5 that had been

placed on her by Dr. McBryde. As part of his evaluation, Mr. Zelenka contacted Dr. McBryde' s office to determine what the restriction "limit standing and walking as much as possible" meant. He then evaluated the physical requirements of the Unite Secretary position by interviewing Hart Smith and one of the Unit Secretaries in the init where Plaintiff was employed. He also observed a Unit secretary performing the job to determine how much time was spent walking and standing. Based upon the information he gathered, Mr. Zelenka determined that plaintiff could not perform the essential functions of the Unit Secretary position while adhering to the restrictions given by Dr. McBryde. (Zelenka Aff. 4-7). His opinion was based primarily upon the fact that the Unit Secretary on 4 East (where plaintiff worked) may be required to cover more than one unit. Id.

Ms. Carter then asked Mr. Zelenka *to* determine if there were any accommodations defendant could

make to allow plaintiff to perform her job. Mr. Zelenka contacted Dr.

3 When an employee is to returned lo work with medical restrictions, it is defendant's policy for the respective department head to meet with a Human Resources specialist to discuss the interplay between the restrictions and the essential job functions. Carter Dep. at 9. Ms. Carter testified that essential functions arc determined by the job description, Key Results, and job specifications. Id.

McBryde's office and they suggested the use of a motorized scooter. Mr. Zelenka determined that the scooter would not fit in all areas pertinent to the job and would not be allowed in certain areas because of space limitations. He, therefore, determined that a motorized scooter was not a viable solution. Id. At 8.

Dr. McBryde completed another prescription form on June l, 2001 stating, " may return to work 6-1-01 but should limit standing and walking as much as possible -

please all if you have any questions." (Plaint.Dep.Exh. 20)

Defendant's Director of Human Resources Compensation and Benefits sent a letter dated July 2, 2001 to plaintiff which reads: as follows:

> We have completed a full and fair review of your appeal for short-term disability benefits. We find no additional information that would allow us to overturn Liberty Mutual' s decision to terminate your short-term disability benefits on August :15, 2000. As you know, Liberty stated that they were not indicating that a condition did or does not exist; however they stated that they did not have the medical evidence to document a condition that prevented you from performing your occupation as a Unit Secretary at McLeod.
>
> However, we do recognize that this has been an unusual situation and has worked an extreme hardship for you. You were not qualified for disability benefit, and yet, we could not let you work with the restrictions your doctor has imposed. Therefore, in the interest of goodwill, we, have made the decision to pay you an amount equal to the maximum short-term disability benefits allowed under our plan.

This payment is not an admission that you are entitled to either short-term or long-term disability benefits and may not he construed as such. By your acceptance of this payment, you agree that you will not use this payment in any manner in regard to any claim for short-term or long-term disability benefits under a McLeod plan.

You will receive this retroactive benefit on the paycheck for pay period ending June 30, 2001. That check will be issued on Thursday, July 5,2001.

It will cover the period from August 15, 2000, through your maximum short-term disability benefit period of November 21, 2000.

As you know, we are continuing to explore avenues to return you to work at McLeod with appropriate accommodations. We will be contacting you about that in the very near future.

Plaint. Dep. Exh. 22.

Plaintiff presented to Dr. McBryde on August 31, 2001, for an office visit. (Plaint. Dep. Exh. 21). It reads as follows:

Thumbelina and her friend are back. Her problem

is pain. Her problem is the fact that she is not allowed to work within the limitations that I have outlined. However, they can not be liberalized at this point in time. I have tried to get in touch with Hart Smith, 843-679-8465, but have been unable to do so. I would like to help her or at least be definitive about whether or not she is able to work. It is my estimate that she will be unable to carry out the full workload for a indefinite time period of time, but estimated at at least six months. The changes that have been present are now such that she will not have an avascular necrosis and will not actually damage her ankle, but it gets to be a mater of how much subjective pain she can handle. She did have a legitimate injury.

Overall, the situation is static. I would be glad to write her a letter regarding disability if, indeed, there is no work for her with the limitations that I have outlined and which I estimate will be necessary for six months. She will let, me know and I will continue to try to get in touch with Hart Smith,

Plaint. Dep. Exh. 21

Defendant's Leaves of Absence policy provides that employees who remain on leave for 12 months without returning to work are subject to termination.

(Broughton Aff. Exh. A at 5).

As of May 26, 2001, plaintiff had been on leave for twelve months and had not returned to her position. Because Defendant felt that she could not perform the essential functions of her job, they offered her the opportunity to transfer to another position within McLeod hat was within her restrictions. Ms. Carter arranged for plaintiff to meet with the Recruiter to locate a job to which plaintiff could transfer. (Carter Dep, at 22-23; Plaint. Dep, 187-88). She explained to plaintiff that she had 60 days to find another job to which she could transfer. (Plaint. Dep. at 190). According to Ms

> Hart Smith wrote a letter dated August 31, 2001, to plaintiff which states as follows:
>
> > Our records indicate that you began a leave

of absence on May 26, 2000. According to McLeod's Leave of Absence policy, a leave of absence ends after 12 consecutive months. However, on July 3,2C01, Human Resources extended your Leave of Absence for 60 additional days to allow you an opportunity to find another position with McLeod Health where your restrictions of "standing or walking limited as much as possible" could be accommodated.

Unfortunately, you did not apply for any open positions. Therefore, your employment with McLeod Health will be terminated on September 1, 2001.
We wish you the very best and thank you for your contribution to McLeod and for your assistance to the patients that we serve.

Plaint. Dep. Exh. 23.

The Job Specification of Unit Secretary is as follows:

The Unit Secretary is a member of the interdisciplinary health care team, serving as receptionist and providing clerical support to all care givers. The

4 Plaintiff does not specifically deny Smith called her or left messages for her. But she does state that she did not need a new job because she could perform her old one. In that she felt Defendant was "not going to let me work." So she just waited for the recruiter to call her. Plaint. Dep. At 18-90.

unit secretary supports the direct care duties of care givers through the coordination of MD orders, obtaining supplies and information, and assisting families, visitors, and Physicians.

(Plaint. Dep. Exh. *7)*

The physical requirements of Unit Secretary as set forth on the Job Specification are as follows:

Ability to lift up to 50 pounds and carry up LO 25 pounds occasionally, will involve some stooping, kneeling, crouching and/or crawling, pushing and pulling with frequent standing and walking; requires manual dexterity with ability to perceive size, shape, temperature or texture; auditory and visual required with attention to verbal abilities and color discrimination.

Id.

The following contains plaintiffs description of the job duties of a Unit Secretary. The job duties of Unit Secretary varied depending on the unit. (Plaint. Dep. at 60). The duties of her position depended on whether she was working the 3:00 to 11:00 shift or the 7:CO to 3:00 shift. Id. at 61. If she worked the 7:00 to 3:00 shift, the primary duties included making sure the lab work was put in correctly, to pull all the lab work up for the doctors when they came in, answering the telephone and the "call light," remain at the desk, and keep an eye on the babies. Id, Other duties included clerical work, like preparing birth certificates, and organizing patient charts. Id. When they were not busy with these duties, they would put up supplies or other tasks that needed to be done. Id. At 64 On average, she would spend one to one and

one half hours standing and 15 minutes walking. Id. At 74-76

The job duties for the 7:00 to 3:00 shift included getting all the lab work in for the next day, making sure all the orders were in the computer, making charts when there was time. Id. at 66-67. Plaintiff primarily worked the 7:00 to 3:00 shift. She, as well as other employees, requested to work other times, but the schedules were made out by unit secretaries who would schedule work time the way they wanted to. Plaintiff complained to management about the scheduling but never received any satisfaction. Id. at 49-54.

There are different six-room pods in each unit. The fourth floor unit has three pods and the second floor unit has two pods. Id. at 68. Each unit had a

secretary during the 7:00 to 3:00 shift, but sometimes one secretary would have to cover two or more units during the 3":00 to 11:00 shift. Id. At 70.

Debra Powell was deposed and testified to the following: She was a Unit Secretary for fifteen years. Powell Dep. at. 9. She worked in all units, including 4-South and 2-.South. She had to do a good bit of walking as part of her position as Unit Secretary, a duty that required walking was to find nurses and technicians who were wanted on the phone. Id. At 19. This would occur 10 to 15 times a day on a busy day. Id. At 25. She would never venture more than seven or eight car lengths from her duty station where the phone and alarm lights were located. Id. At 26. She had to "get around a lot" as part of her position. Id. At 20.

Miriam Carter testified at deposition that she spoke to plaintiff when considering whether or not plaintiff could return to work and plaintiff told her that the job required her to walk or stand for three to four hours a day. Carter Dep. at 12. She further testified as follows:

> Well based on what Thumbelina told us when we met with her that she would have to go into patients room to get the birth certificates, that she would have to track down literally doctors or nurses for messages or orders, that she would at times have to go to the lab, that at times she would have to go to nutrition services, at times she would have to go to the general store, that she would have to stock supplies. That' s what Thumbelina told me.

Id. at 16-17.

Hart Smith described the duties of Unit Secretary as follows:

> Pretty much most unit secretaries in the hospital job duties are pretty much the

same. However, the ones in the Pavilion are a little different. Unit secretary answers the telephone, answers patient lights, enters physician orders into the computer, takes orders off the chart, notifies the nursing staff when there orders that have been entered that need actions taken, returns the chart back to the nurse when she'd finished having taken those orders off, orders supplies, both desk supplies a lot of times, sometimes nutritional supplies as well, and then puts those supplies away when they come, puts away material supplies that come that are medically related, not coming on the cart, but that you would order from the warehouse, keeps an inventory of supplies to know when you're running out and when you're not running out. In the Pavilion the unit secretary may go room to room and get birth certificate data from the patient if the birth certificate person is not available to do that and that basically is go to a room, leave information that's needed to record the baby's bed, and then go back to that room and pick that information back up. The unit secretary may go to the lab, to the pharmacy, either to pick up medications, pick up diets, supplies, pick up a patient tray, communicates with physicians if the nurse needs to get a physician on the telephone. She may get the physician's office on the phone so (.he nurse can speak to the

> physician, in the Pavilion she may cover two floors in a shift. She might cover second and third floor - I mean second and fourth floor instead of just one nurses station. If she is at the 4-South days and any time that she stationed there, she would probably cover newborn nursery which means helping out the nursing staff in newborn nursery with anything they need as far as orders, enter charges. There are certain charges or procedures that are done on newborns that the secretary would have to enter into the computer. That's pretty much it.

Smith Dep. at 9-11.

Smith also testified that many of the distance walking (1/8 to ¼ of a mile) duties are shared between unit secretaries, nursing assistants and nursing staff. But mostly are performed by unit secretaries because others are taking care of patients. She testified that nursing staff would watch the phones and the patient lights when a unit secretary had to walk away from, her

desk. She further testified that theses duties would fall under the general duties of the job. Id. At 18-24

On March 12, 2001, Liberty Life Assurance Company sent a letter to plaintiff informing her that they reconsidered their denial of her claim for Short-Term Disability benefits, but determined that she was disabled from performing her "own occupation." In the letter it states,

> Defendant maintains a Modified Duty Policy which states in pertinent part as follows:
>
> REASON: to provide opportunities for employees to return to work after an injury illness when work requirements are temporarily restricted by a Physician's order.
>
> POLICY; McLeod recognizes the need for employees to return to work as .soon as possible after an injury/illness upon written release from a physician or practitioner. Each Department Director will have the responsibility of defining modified duties based upon physician guidelines for the employee. For employees injured on the

> job, every effort will be made to return them to work within their department or within another McLeod Department. For injuries not work related, temporary restrictions will be reviewed in relation to the essential functions of the employee's job. If the Department Director is unable to define modified duties so that the essential functions of the job are not compromised. The Human Resources staff will be available for a consultation.
> Broughton Aff Exh. B

While employed at McLeod, plaintiff's job performance was satisfactory. She received one warning in 1985 for taking too many sick days, although her supervisor noted that the sick days seemed to have been taken due to legitimate reasons.

STANDARD OF REVIEW

Defendant filed its motion for summary judgment pursuant to Rule 56, FRCP. Because defendant is the moving party, it bears the burden of showing that summary judgment is proper. Summary

judgment is proper if there is no genuine issue of material fact and the moving party-is entitled to judgment as a matter of law. Rule 56(ç), FRCP;Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment is proper if the non-moving party fails to establish an essential clement of any cause of action upon which the non-moving party has the burden of proof. Celotex, 477 U.S. 317. Once the moving party has brought into question whether there is a genuine issue for trial on a material element of the non-moving party' s claims, the non-moving party bears the burden of corning forward with specific facts which show a genuine issue for trial. Fed.R.Civ.P. 56(e)Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.. 475 U.S. 574 (1986). The non-moving party must come forward with enough evidence,

beyond a mere scintilla, upon which the fact finder could reasonably find for it. Anderson v. Liberty Lobby. Inc.. 477 U.S. 242, 247-48 (1986). The facts and inferences to be drawn therefrom must be. viewed in the light most favorable to the non-moving party. Shealy v. Winston. 929 F.2d 1009, 1011 (4th Cir. 1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Barber. Hosp. Corp. of Am.. 977 F.2d 874-75 (4th Cir. 1992). The evidence relied on must meet" the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corp.. 12 F.3d 131C, 1316 (Cir. 1993).

ANALYSIS DISCRIMINATION ON THE BASIS OF RACE

There are two methods of proving a case of intentional discrimination under Title VII: the method set forth in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (mixed-motive) and the method established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(pretext).[4]

Under the McDonnell Douglas analysis, plaintiff has the initial burden of demonstrating a *prima facie* case of discrimination. To establish *& prima fade* case, plaintiff must, show (l) she is a member of a protected class: (2) she was qualified for his job and his job performance was satisfactory; (3) she suffered an adverse employment action; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances. Bryan v. Bell Atlantic Maryland, Inc., 288 F.3d 124, 133 (4 * Cir. 2002).[6] The fourth element

can be established by presenting evidence raising an inference of discrimination. Once plaintiff has established a *prima facie* case, the burden shifts to the defendant to produce a legitimate, nondiscriminatory reason for the termination. Texas Dept. of Community Affairs v. Burdine. 450 U.S. 248, 254 (1981) This is merely a burden of production, not of persuasion. St. Mary's Honor Center v. Hicks. 509 U.S. 502, 506 (1993). Once the Defendant has met its burden of production

5 Plaintiff asserts that the Supreme Court's opinion in Desert Palace v. Costa. 539 U.S. 90 (2003) in essence eliminates the burden shifting scheme and necessity of the pertinent pr/m *facie* case established in McDonnell Douglas. At least in this circuit, this argument is without merit. See Hill v. Lockheed Martin Logistics Mgt. Inc., 354 F.3d 277 (4* Cir. 2004).

6 The required elements of a prima facie case of employment discrimination are the same under Title VII and Section 1981. Gairola v. Commonwealth of Va. Dept. of Gen. Servs., 753 F.2d 1281, 1285 (4th Cir.1985).

By producing its legitimate nondiscriminiatory reason. The sole remaining issue is discrimination vel non." Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133, 143 (2000) (citing Postal Service Bd. of Governors v. Aikens. 460 U.S. 711, 716 (1983)). In other words, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the legitimate reason produced by the defendant is not its true reasons, but were pretext for discrimination. Reeves. 530 U.S. at 143, During all of the burden shifting scheme set forth in McDonald Douglas, the ultimate burden of proving that defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

There is no dispute as to the first and third 7 prima facie elements. Defendant challenges plaintiffs proof as to the second *and* fourth elements. Specifically, defendant asserts that plaintiff has failed To establish that she

was qualified to perform the job and that others who were not members of the protected class were retained under apparently similar circumstances. Plaintiff presents opposing arguments.

Others Retained Under Similar Circumstances

Plaintiff presents evidence of other employees allowed to return to work with medical restrictions. Specifically, she asserts that Debra Powell, Detra Leake, a nurse in the NICU, Ronnie Lane, Banks Jenkinson, a girl with a speech disability in a doctor' s office at McLeod, Joyce in the business office, Anthony, and Brenda in housekeeping were treated more favorably than her.

[7] In its brief, defendant concedes for purposes of this motion that placing plaintiff on leave without pay in May 2000, that not. allowing plaintiff to return to work with the restrictions placed upon her by Dr. McBrydc. and that her termination all qualify for adverse employment actions

Plaintiff must establish that "other employees" were similarly situated in all relevant respects; that they "dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct without such mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Mitchell v. Toledo Hosp., 964 F2d 577, 583 (6th Cir. 1992); Kadue v. Kimberly-Clark Corp., 219 F3d 612,617-18 (7th Cir. 20QO)(holding that plaintiff must demonstrate that the same supervisor was involved in comparable situations to demonstrate disparate treatment of similarly situated employees); Stanback v. Best Diversified Products. Inc.. 180F.3d903,91Q(8thCir. 1999)(same}; Shumwaw. United Parcel Serv.. Inc.. 188 F.3d 60,64(2d Cir. 1997)(employees were not similarly situated because they were not supervised by the same

person).8

Of the employees listed by Plaintiff as treated disparately, only Debra Powell and Detra Leake worked with or reported to the same supervisor. Plaintiff does not contest this. Leake took a leave of absence in January 1999 from her position as a Vital Statistics Clerk after she suffered a severe asthma attack which resulted in hospitalization. (Broughton Alf. ¶ 15). Her leave of absence was protected by the Family Medical and Leave Act. Id. She remained out until March 15, 1999, at which time she was released to work for four hours per day with the restriction of no lifting over 50 lbs. without assistance. Id. Because Ms. Leake was subject to, Leake was

[8] There is no published Fourth Circuit case on point; however, the Fourth Circuit has cited with approval the precedent in this string cite in the unpublished cases of Plateau

v. South Carolina Commission for the Blind. 2002 WL 31553805 (4th Cir. 2002); Heyward v. Monroe. 1998 WL 841494 (4th Cir. 1998); Edwards v. Newport News Shipbuilding and Dry Dock Co.. 1998 WL 841567 (4th Cir. 1998).

Released to return to work without restriction on March 31., 1999. Id.

Plaintiff in her brief does not contest that Ms. Leake was not similarly situated to plaintiff and it is obvious that she was not.

Paragraph 13 and 14 of Jean Broughton's affidavit provides the following information relevant to Debra Powell. *Ms.* Powell, a white female, was a unit secretary. In April 1999, she suffered a non work related back injury. She was initially out of work from April 7 through April 16 as a result. Because she was eligible for leave under the FMLA, all of her absences were classified as personal medical leave. On May

4,1999, Ms. Powell had an epidural steroid injection in her back following which her physician released her to return to work four hours per day with a restriction of no heavy repetitive lifting or bending, Beginning on June 9, 1999, Ms. Powell took a personal medical leave of absence in order to have surgery on her back. She remained out of work until August 2, 1999, at which time she was released to return to work with no restrictions. On August. 30,2000, Ms. Powell was severely injured in recreational vehicle accident. She was hospitalized for 11 days following the accident. because she was eligible for FMLA act leave, she was placed on personal medical leave of absence effective August 30, 2000. She was released to return to work without restriction on November 20, 2000.

In her brief, plaintiff argues that the medical

restriction of "no heavy repetitive lifting or bending" is at least as unclear as the medical restriction of "limited standing or walking as much as possible," Specifically, she argues that the job description requires lifting of " up to 50 pounds. It is unclear whether or not the medical restriction paced on Ms. Powell would prevent her from performing the job based on the job description.

Initially, it is plaintiff's burden to establish that Ms. Powell was similarly situated for purposes of Title VII, The job description requires the ability to lift up to 50 pounds and carry up to 25 pounds occasionally. The medical restriction did not prohibit the lifting of up to 50 pounds, but restricted repetitive lifting of such weight. Nonetheless there is nothing in the record that establishes that repetitive heavy lifting is part of the essential functions of the job. From this alone, the

restrictions on returning to work are dissimilar and therefore, Ms. Powell is not a proper comparator for purposes of Title VII. The restriction on its face did not conflict with the job specifications. Additionally, unlike plaintiff, Ms. Powell was released to return to work with restrictions after less than one month and without any restrictions after four months. Plaintiff, on the other hand, was unable to return to work involving any standing or walking for a period of approximately six months. Accordingly, plaintiff has failed to present sufficient evidence to establish an issue of fact as to whether or not she and Ms. Powell were similarly situated. Plaintiff further argues that she has established other facts from which an inference of discrimination may be taken. She asserts defendant' s witnesses contradict each other

[9] Plaintiff had not worked 1250 hours in the 12-month period preceding her leave and therefore, was not eligible for FMLA leave. Broughton Aff.

Regarding the restrictions placed on plaintiff. She argues that Hart Smith testified that she interpreted the restriction placed on plaintiff to prohibit plaintiff from walking or standing while Carter testified that she understood the restriction to riot totally prohibit walking and standing. She further argues that Hart Smith testified that essential functions of the job include general duties not included in the job description, key results or job specifications while Carter testified that the essential functions are determined from those documents. Plaintiff also argues that an inference of discrimination can be taken from defendant' s unreasonable interpretation of, or

unreasonable questioning of the meaning of, Dr. McBryde's restrictions. She asserts that these inconsistencies and contradictions in testimony shows a deliberate attempt to " stonewall plaintiff's return to work."

A cursory review of the documentation from Dr. McBryde clearly presents some confusion as to the definitive restrictions placed on plaintiff as applied 10 the duties of a unit secretary. Also, in the light most favorable to the plaintiff, Carter was more expansive tc some degree than Hart in describing the job duties of a unit secretary but Hart's description is subsumed within the description given by Carter. Plaintiff fails to meet her burden f showing an inference of discrimination.

Plaintiff has failed to present sufficient evidence to show

similarly situated employees were treated differently or other facts sufficient to raise" an inference of discrimination. " Therefore, plaintiff has failed to establish the fourth element of the prima facie case.

Qualified to Perform Job

Plaintiff argues that the evidence establishes that the essential functions of a Unit Secretary requires walking ten to fifteen times in an 8 hour shift for at most a couple of minutes each time. She argues that this restriction is within the restriction placed upon her by Dr. McBryde, arid that Dr. McBryde's restrictions did not prohibit the use of a wheelchair. She asserts that Dr. McBryde'!; restrictions lessen over time which is typical of the healing process, and that a reasonable juror could conclude that plaintiff could perform the essential functions of a Unit Secretary under the

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restrictions in place from Dr. McBryde.

Plaintiff asserts also that she could have returned to work in a wheelchair after August 14. 200C, when Dr. McBryde released her to return to work with the restriction "cannot be on feet at work during day." She then asserts that following Dr. McBryde' s restriction of " work must not include in an 8 hr period (1) more than 1C minutes at time w/ 20 min resting period. During 10 min walking no lifting.) 4 lbs./' plaintiff could clearly have performed the essential functions of the job, especially with the use of a wheelchair. She then states that following Dr. McBryde' s restriction on March 15 and 19, 2001, of "should limit standing and walking as much as possible," it is clear that she was allowed to

walk intermittently and probably more. Plaintiff states that Dr. McBryde' s note of April 9, 2031, stating " job can not entail standing and walking" indicates that the restriction ended on April 1, 20C1, and does not conflict with a return to work on April 14,2C01: and certainly did not prohibit use of a wheelchair. Plaintiff states that Dr. McBryde's June 1,2001, note was consistent with the previous restrictions of "should limit standing and walking as much as possible." Finally, plaintiff argues that Dr. McBryde' s August 31,2001, note states that plaintiff will "not actually damage her ankle, but it gets to be a matter of how much subjective pain can she handle." She argues that had Ms. Smith or Ms. Carter called Dr. McBryde at an earlier time, Dr. McBryde would have given them this information.

The record establishes that Plaintiff was prohibited from working from May 24, 2000 until Dr. McBryde released her to return to work with restrictions. On August 14, 2000, when he circled both yes and no in responses to whether or not she could return to work and placed her on restriction of no standing or walking with indefinite duration. Plaintiff clearly can not perform the essential functions of the job without accommodation[10] at this point. On November 22, 20CO, Dr. McBryde released her to return to work with a restriction of " no walking if possible." The restriction indicated that if it was necessary to walk, walking should be limited to ten minutes at a time with a twenty minute resting period and no carrying of greater that four pounds. It is not clear from the record whether or not the essential

functions of the job would prevent such a time remaining to allow such resting intervals. Common sense dictates it would not, but in the light most favorable to the plaintiff, an issue of fact does exist.

Dr. McBryde's note of April 9,2001, stated that she could return to full schedule if "no standing or walking as part of job." He then wrote a note on April 14, 2001, stating that she could return to work with limited "standing and walking as much as possible." His note of June 1, 2001, included the same restriction. Finally, his note of August 31, 2001, stating that the limitations could not be liberalized, but that her limitations would be subject to her subjective pain and indicated a duration of at least six additional months.

[10] Plaintiff did not bring this claim under the ADA and plaintiff has failed to show defendant's non-FMLA policy or other "accommodations" for plaintiff. Nonetheless, Mr. Zelenka's testimony that a wheelchair accommodation was not feasible is uncontradicted.

The job description states that the position of Unit Secretary requires frequent standing and walking. Debra Powell testified that the job requires "a good bit of walking" and she had to "get around a lot" as part of the position. She specifically described the necessity to walk when having to find personnel who were wanted on the phone. Hart Smith testified to duties requiring substantial walking and standing. Miriam Carter testified that the job required substantial walking and standing as relayed to her by plaintiff. the only evidence in the record indicating that limited walking and standing was not necessary to perform the essential functions of the job is the testimony of the Plaintiff. However, plaintiff did testify that she would stand or walk for one and

one-half hours per day. This is not simply a "word against word" situation. Defendant has a written policy describing the requirements of the job. The written policy states that the job entails frequent walking and standing. All the evidence, except Plaintiff's testimony is consistent with the written policy. It becomes more confusing when reference is made to documentation from Dr, McBryde.His note of Nov. 22, 2000 seems to indicate, in the light most favorable to Plaintiff, plaintiff could perform the essential functions f her job. Plaintiff testified her job required her to stand and walk one to one and a hall hours in an eight hour day. Dr. McBryde indicated she could be on her feet ten minutes per hour which would be one hour and twenty minutes in an eight hour day. In the light most favorable to plaintiff, she could perform the job. However, Dr. McBryde's April 9, 2001, note

indicates no standing and walking as part of her job. With this restriction, she could not perform the duties of the job. Then Dr. McBryde provides a restriction of limiting standing and walking as much as possible.

The uncontradicted evidence indicates that Smith and Carter solicited the assistance of John Zelenka who conducted a study to determine whether or not plaintiff could perform the essential functions of the job and that he contacted Dr. McBryde during his determination. It is also uncontradicted that Smith relied upon Mr. Zelenka's opinion in determining that plaintiff could not perform the essential functions of her job.

Assuming, arguendo, that plaintiff has established a prima facie case of discrimination based on race, defendant has articulated its legitimate, nondiscriminatory reason for terminating plaintiff's employment: she could

not perform the essential functions of the job and failed to return to work within the twelve month period. See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996)(once plaintiff establishes a prima facie case, defendant has the burden of production to articulate a legitimate, nondiscriminatory reason). Therefore, plaintiff carries the burden of showing defendant's articulated reasons arc not the true reasons, but were a pretext to discrimination. Reeves v. Sanderson Plumbing Products, inc., 530 U.S. 133 (2COO),

Plaintiff has the ultimate burden of presenting evidence from which a reasonable jury could conclude defendant intentionally discriminated against her based on her race. It is not necessary to decide "whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiffs termination."[11]

Hawkins v. Pepsico. 203 F.3d 274, 279 (4thCir.

11 "Proof that the employer's proffered reasons are not persuasive, or even obviously contrived,. . . does not necessarily establish that [plaintiff's] proffered reason (race

2000)(quoting and citing DeJarnette v. Coming Inc., 133 F.3d293,299(4thCir. 1998); DeJarnette, 133 F.3d at 299 ("[T]his Court docs not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination ...." (internal quotation marks omitted: Henson v. Leggett Group. Inc.., 61 F.3d270,277 (4th Cir. 1995} ("We have recognized the importance of giving an employer the latitude and autonomy to make business decisions, including workplace reorganization on, as long as the employer does not violate the ADA."); Jiminez v. Man,' Washington Coilene. 57 F.3d 369, 377

(4th Cir. 1995) ("Title VII is not a vehicle for substituting the judgment of a court for that of the employer"). K is the perception of the employer that is critical. Hawkins, 203 F.3d a(280. Even a reasoned decision based on incorrect facts is not evidence of pretext. Poliard v. Rea Magnet Wire Co.. 824 F.3d 557,559 *(7th* Cir. 1987}, cert, denied. 484 U.S. 977 (1987).

Whether or not plaintiff could perform the essential functions of a Unit Secretary at any of the intervals is at best a weak issue of fact. Such a conclusion is not the ultimate termination. Contrary to plaintiff's position, Dr. McBryde's restrictions do not convey an obvious ability to return to work, Finally, Hart Smith relied on Zelenka' s opinion that plaintiff could not perform the essential functions of the job.

even in the light most favorable to the Plaintiff, no reasonable jury could determine the racial discrimination was the reason for the Defendant's actions.

Plaintiff may also proceed under the mixed-motive method of establishing intentional discrimination)... is correct," Reeves, 530 U.S. at 146-47. "It is not enough to disbelieve the [employer]." Love-Lane v. Martin. 355 F.3d 766, 788 (4th Cir. 2004). Plaintiff must show a reasonable jury could "believe [her] explanation of intentional race discrimination." Id_. Under this method, a plaintiff must present sufficient evidence, direct or circumstantial, that, despite the existence of legitimate, nondiscriminatory reasons for the adverse employment action, an illegal

factor (i.e., race) was a motivating factor in the decision. Hill, 354 F.3d at 284-86. Plaintiff need not show race was the sole motivating factor but only that *it* was a motivating factor. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). The racial bias must come from a relevant decisionmaker.[13] Also, the protected trait." must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome." Hill, 354 F.3d at 286.

Clearly, Plaintiff's claim that she was placed on leave without pay was motivated by racial bias is without merit. Plaintiff was not Eligible for FMLA A leave. Therefore, she was placed on leave under defendant's non-FMLA leave policy. This leave is without pay. There is no evidence to suggest that race played any role in this

decision.

Plaintiff also claims intentional discrimination based on defendant's refusing to allow her to return to work with restrictions. She relies on her assertions that defendant allowed other, similarly situated white employees to work with restrictions which were at least equally restrictive as plaintiff's restrictions.

As discussed above, Plaintiff comparators were not similarly situated and therefore plaintiff has failed to make a sufficient showing that race played a motivating role in Defendant's

[12] This analysis is not applicable to plaintiffs §1981 claim. The Civil Rights Act of 1991 did not amend §1981 to add the mixed-motive standard. See 42 U.S.C. §1981.

[13] See Hill, 354 F.3d at 291 ("an employer will be liable

not for the improperly motivated person who merely influences the decision, but for the person who in reality makes the decision.").

Decision making.

Plaintiff also claims the termination of her employment was motivated in part by racial bias. It is uncontradicted that defendant' s leave of absence policy provided for termination if the employee is unable to return to work after a 12 month period. Plaintiff was not able to return to work within 12 months of taking a leave of absence. However, defendant did not terminate her employment at that lime but extended her leave of absence to allow her to transfer to another position that she could perform. Plaintiff failed to do this.

Plaintiff fails to present sufficient evidence from a which a reasonable jury could determine that the decision to terminate her employment or other adverse action was

based in part on racial bias. Regardless of the method of proof utilized, plaintiff has the ultimate burden of presenting sufficient evidence that the adverse actions were a result of racial discrimination. Plaintiff has failed this burden and defendant's motion for summary judgment should be granted.

CONCLUSION

Based on the foregoing, it is RECOMMENDED that defendant's motion for summary judgment (Doc. #19) be GRANTED.



Thomas Rogers, III United States Magistrate Judge

December 28, 2004 Florence, South Carolina

The parties' attention is directed to the important notice on the next page

UNITED STATES DISTRICT
COURT
FOR THE DISTRICT OF SOUTH
CAROLINA
FLORENCE DIVISION

Thumbelina Brown,)
)
Plaintiff,) Civil Action No.: 4:02-3973-
RBH
)
vs.) **ORDER**
)
McLeod Regional)
Medical Center of the)
Pee Dee, Inc.,)
)
Defendant.)
)

In this matter, the plaintiff, Thumbelina Brown ("Brown"), alleges disparate treatment race discrimination under Title VII, 42 U.S.C. § 3QOOe, *et seq.*, and 42 U.S.C. § 1981. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(I)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial

matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

Plaintiff filed this case on October 29, 2002. Defendant removed the case to this Court on November 25, 2002, and filed its answer on November 27, 2002. Defendant filed a Motion for Summary Judgment on April 15,2004. Plaintiff filed a response on April 27,2004. Defendant filed a reply on May 7, 2004,

This matter is now before the undersigned for review of the Report and Recommendation ("the Report") filed by United States Magistrate Judge Thomas E. Rogers, III, to whom this case had previously been assigned pursuant to 28 U.S.C. § 636(b)(l)(A) and Local Rule 73.02(B)(2)(g). In his Report, Magistrate Judge Rogers carefully considers these issues and recommends that the defendant's Motion for Summary Judgment be granted. Plaintiff filed objections to the Report on

January 24,2005. Defendant filed a response to plaintiffs objections on January 20,2005. In her objections the plaintiff alleges that the Report's finding that the defendant is entitled to summary judgment is in error. The plaintiff objects to (1) the Magistrate Judge's application of the *McDonnell Douglas* shifting burden test at the summary judgment stage of this case and (2) the Magistrate's finding that the record does not present a genuine issue of material fact as to the fourth element of the plaintiffs race discrimination claim.

In conducting this review, the Court applies the following standard:

> The magistrate judge makes only a recommendation to the Court, to which any party may file written objections.... The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a *de novo* determination of those portions of the report or specified findings or recommendation as to which

an objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual report and recommendation to which no objections are addressed- While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations. *Wallace v. Housing Auth. of the City of Columbia, 791 F.* Supp. 137, 138 (D.S.C. 1992) (citations omitted).

Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy

workers compensation benefits were paid and, after plaintiff used her sick days and leave days, she returned to work as a Nursing Assistant, although she continued to experience pain in her back and legs. The position of Unit Secretary, which was less physically demanding that the Nursing Assistant position, became available and plaintiff accepted that position in October of 1998.

On or about May 24, 2000, plaintiff broke her ankle in an automobile accident. Following surgery on her ankle, she was unable to return to work and she requested a leave of absence. Plaintiff supervisor, Hart Smith, sent a memo to the Plaintiff stating:

> We are sorry to hear of you accident week before last.. I have tried to call you to see how you were doing but we do not have a phone number. The only number that we have is not what has been disconnected. I have received tour "certificate of absence" from you but will need a medical certification" completed as well. I have attached a copy for you and also a copy of the FMLA notice. Please remember that you must contact Human Resources as well as the insurance company for your short

> term disability. This must be dons after 15 calendar days from you first day of absence. Please let us know it there is anything we can do for you. Keep us informed on your progress and when we can anticipate your return to work. Once again I hope you are better and if there is anything we can do please let us know.

(Plaintiff's Dep. Exhibit 10) Dr. Angus McBryde completed a Medical Certification on June 12, 2000, indicating plaintiff could not return to work and would be unable to for three (3) months or longer. Plaintiff kept defendant current on her condition.

On July 17, 2000, a Human Resources employee sent a letter to plaintiff informing her that her request for medical leave of absence was approved beginning May 26, 2000, and that her leave did not qualify for FMLA protection. Plaintiff was also informed that "[b]efore returning to work from a leave of absence, you must contact Human Resources, who will coordinate your return to work with your department." (Plaintiff's Dep. Exhibit 12)

Dr. McBryde completed a Medical Certification for the Plaintiff on August 14, 2000. On that form, he circled both "yes" and "no" in response to whether Plaintiff was currently able to work. He.

1 Plaintiff did not qualify for FMLA protection because she did not work the minimum number of hours in her previous year of employment to qualify under the statute.

wrote that plaintiffs physical limitation upon return to work was "no standing or walking" and that the duration of the present incapacity was indefinite, "depending on off feet." (Plaintiffs Dep. Exhibit 15)

On November 22, 2000, plaintiff return to Dr. McBryde for a follow-up visit. After a discussion of plaintiffs ability to return to work, Dr. McBryde placed restrictions on her ability to return to work. These restrictions, based on an eight (8) hour days, included (1) no more than ten (10) minutes per hour on her feet. (2) no

more than five (5) minutes walking per hour (this is included in (1)), and (3) should not carry anything over three (3) to four (4) pounds during the minimal time on her feet.[2] There are also notes, written in a different handwriting, indicating "no walking if possible. If walking, only 10 min at time w/ 20 min resting period." (Plaintiffs Dep. Exhibit 16) Plaintiff took this note with restrictions to defendant because she was ready to return to work. Defendant informed plaintiff that they could not accommodate her restrictions ,

Plaintiff returned to see Dr. McBryde on March 19,2001. His office notes indicate: "She may return to work 4/14/01 but should limit standing and walking as much as possible." Dr. McBryde completed another Medical Certification on April 9, 2001. As to the duration and frequency of episodes of plaintiffs incapacity he wrote "intermittent pain and [increased] limp . . . job cannot entail standing [and] walking." (Plaintiffs Depo. Exhibit 19) He noted a twenty percent (20%) permanent impairment of plaintiff s right foot and that her incapacity ended on April 1,2001. Dr. McBryde indicated that she

could return to work full schedule and placed the restriction of "no standing or walking as part of job." Because of these restrictions, plaintiff was not allowed to return to work.

" There are also two restrictions listed that are illegible.

After Dr. McBryde's April 9,2001 note, plaintiff met with Hart Smith, plaintiffs supervisor, and two benefit specialists of the defendant, Miriam Carter and Pam Erwin? Following this meeting Carter, Smith, and Erwin were unable to determine if plaintiff was capable of returning to work with Dr. McBryde's restrictions. Consequently, Ms. Carter contacted John Zelenka, defendant's Work Recovery Manager, and asked Mm to perform a work site evaluation to determine if plaintiff could perform the essential functions of the Unit Secretary position with the restrictions placed on her by Dr. McBryde. As part of this evaluation Mr. Zelenka contacted Dr. McBryde's office, evaluated the physical requirements of the Unit Secretary

position by interviewing Hart Smith and one of the Unit Secretaries, and observed a Unit Secretary to determine how much time was spent walking and standing. Based upon this information Mr. Zelenka determined that plaintiff could not perform the essential functions of the Unit Secretary position while adhering to the restrictions given by Dr. McBryde.

Ms. Carter then asked Mr. Zelenka to determine if there were any accommodations the defendant could make to allow plaintiff to perform her job. Mr. Zelenka contacted Dr. McBryde's office and they suggested the use of a motorized scooter. Mr. Zelenka determined that the scooter would not fit in all areas pertinent to the plaintiffs job and would not be allowed in certain areas because of space limitations. As a result, he determined that a motorized scooter was not a viable solution.

On June 1,2001, Dr. McBryde completed a prescription form stating plaintiff "may return to work 6-1-01 but should limit standing and walking as much as possible-please call if you have any

It is the defendant's policy that when an employee is to return to work with medical restrictions the respective department head meets with a Human Resources specialist to discuss the interplay between the restrictions and the essential job functions of the employee. Ms. Carter testified that essential functions are determined by the job description. Key Results, and job specifications.

questions." (Plaintiff's Depo. Exhibit 20) Defendant's Director of Human Resources Compensation and Benefits sent a letter to plaintiff dated July 2, 2001 , That letter informed plaintiff:

> We have completed a full and fair review of your appeal for short-term disability benefits. We find no additional information that would allow us to overturn Liberty Mutual's decision to terminate your short-term disability benefits on August 15, 2000.
>
> *****
>
> However, we do recognize that this has been

an unusual situation and has worked an extreme hardship for you. You were not qualified for disability benefit, and yet, we could not let you work with the restrictions your doctor has imposed. Therefore, in the interest of goodwill, we have made the decision to pay you an amount equal to the maximum short term disability benefits allowed under the plan.

This payment is not an admission that you are entitled to either short-term of long-term disability benefits and may not be construed as such. By your acceptance of this payment, you agree that you will not use this payment in any manner in regard to any claim for short-term or long-term disability benefits under a McLeod plan.

(Plaintiffs Depo. Exhibit 22)

On August 3 1 , 200 1 , plaintiff again had an office visit with Dr. McBryde. His notes indicate

1 have tried to get in touch with Hart Smith, 843-679-8465, but have been unable to do so. I would like to help her, or at least be definitive about whether she is or is not able to work. It is my estimate that she will be unable to carry out the full workload for a [sic]

indefinite period of time, but estimated at least six months.

******

Overall, situation is static, I would be glad to write her a letter regarding disability if, indeed, there is no work for her with the limitations that I have outlined and which I estimate will be necessary for six months. She will let me know and I will continue to try to get in touch with Hart Smith.

(Plaintiffs Depo. Exhibit 21)

Under defendant's leave of absence policy employees who remain on leave for twelve (12) months without returning to work are subject to termination. Plaintiff had been on leave for twelve (12) months on May 26, 2001, without returning to work. At this time defendant concluded that plaintiff could not perform the essential functions of her job and they offered her the opportunity

to transfer to another position within McLeod that was within her restrictions. Ms. Carter arranged for plaintiff to meet with the Recruiter to locate a job to which plaintiff could transfer and explained to plaintiff that she had sixty (60) days to find another job to which she could transfer. According to Ms. Carter, she telephoned plaintiff on several occasions to inform her of positions available that met the plaintiffs restrictions and told her that she should contact the recruiter immediately. Plaintiff never had any further contact with defendant about transferring to another position.[4] Hart wrote a letter dated to plaintiff dated August 31,2001, stating:

> Our records indicate that you began a leave of absence on May 26,2000. According to McLeod's Leave of Absence policy, a leave of absence ends after 12 consecutive months. However, on July 3, 2001, Human Resources extended your Leave of Absences for 60 additional days to allow you an opportunity to find another position with McLeod Health where your restrictions of "standing or walking limited as much as possible"

could be accommodated.

Unfortunately, you did not apply for any open positions. Therefore, your employment with McLeod Health will be terminated on September 1, 2001.

We wish you the very best and thank you for your contribution to McLeod and for your assistance to the patients that we serve.

(Plaintiffs Depo. Exhibit 23)

Application of the *McDonnell Douglas* Shifting Burden Test at the Summary Judgment Stage

The plaintiff argues that it is improper for this Court to use the *McDonnell Douglas* burden shifting test at the summary judgment stage of this case. This argument is based on the U.S. Supreme court's decision in *Desert Palace, Inc., v. Costa,* 539 U.S. 90(2003). Plaintiff suggests that *in Desert*

4 Plaintiff does not specifically deny that Smith called her or left messages for her, but she does state that she did not need a new job because she could perform her old one and that she felt defendant was "not going to let me work" so she just waited for the recruiter to call her.

(Plaintiffs Depo. at 189-190)

Palace

> the [United States Supreme] Court addressed the mixed-motive versus single motive distinction which had formerly been employed by Federal Courts since the decision in Price Waterhouse v Hopkins, 40 U.S. 228,109 S.Ct. 1775,104L.Ed.2d268 (1989), and found that the legislation did not allow a shifting burden of proofs, but called for a mixed motive analysis of all claims, whether presented through direct or circumstantial evidence. This finding, and the clear legislative intent of creating an affirmative defense of the employer, rather than a shifting burden standard at summary judgment precludes the use of the McDonnell Douglas Shifting Burden Test at the Summary Judgment stage.

(Objections pp. 1-2) The plaintiff alleges that "[t]he Fourth Circuit has since correctly continued to apply the shifting burden analysis to ADEA claims, which, unlike the ADA, Title VII and 42 U.S.C. 1981, does

require, in the direct statutory language, a single motive analysis." (Objections p. 2) She also objects to the Magistrate Judge's reliance on *Hill v. Lockheed Martin Logistics Management*, 354 F. 3d 277 (4th Cir. 2004), with regard to his determination on this issue on the basis that the Court in that case was evaluating an ADEA claim and a sex discrimination claim "which explains why the Court would have applied the shifting burden type analysis to those claims in that case."

Defendant asserts that the Magistrate Judge correctly used the *McDonnell Douglas* analysis in this case. The assertion is based on the allegation that (1) *Desert Palace* did not eliminate the *McDonnell Douglas* standard of proof and (2) that plaintiff s objection does not change the ultimate outcome of this case because the Magistrate Judge analyzed the evidence under both the mixed-motive standard of proof and the *McDonnell Douglas* analysis.

***McDonnell Douglas* v. Mixed-Motive Standards of Proof**

The courts have recognized that there are some situations where dual motivations, one illegal and one legal, may exist, and simultaneously motivate an employer's actions. *See, e.g. Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), These situations are referred to as "mixed-motive" cases. Prior to the Civil Rights Act of 1991 ("the Act"), a finding that the employer had a permissible reason to make its decision allowed the employer to escape liability altogether. *Id.* The Civil Rights Act of 1991 partly clarified, partly affirmed, and partly overruled the *Price Waterhouse* decision. *See* 42 U.S.C. § 2000e. The Act affirmed the decision that mixed motive is an affirmative defense on which an employer bears the burden of persuasion. However, the Act overruled the *Price Waterhouse* decision with regard to damages, stating that an employer may avoid only (1) liability for monetary damages and (2) being subject to an order requiring instatement, reinstatement, or promotion.

After the passage of the Civil Rights Act of 1991, most appellate Courts required direct evidence for

the mixed motive framework to apply. *See, e.g. Taylor v. Virginia Union Univ.*, 193 F.3d 219 (4th Cir. 1999); *Wilson v. Firestone Tire&Rubber Co.*, 932 F.2d 510,514 (6th Cir. 1991); *Jones v. Gerwens*, 874 F.2d 1534, 1539 (11th Cir. 1989). However, the Supreme Court in *Desert Palace, Inv. v. Costa*, 539 U.S. 90 (2003), held that direct evidence of discrimination is not required for a plaintiff to obtain a mixed-motive jury instruction under Title V1L That case held that the statute's words are unambiguous and the law does not require a plaintiff to make a heightened showing through direct evidence. *Id.* at 98-99. Rather, a plaintiff may prove her case by a preponderance of the evidence using direct or circumstantial evidence. *Id.* at 99.

Plaintiffs claim is that the *McDonnell Douglas* analysis is no longer appropriate for use at the summary judgment stage of a case. However, plaintiff fails to provide this Court with any authority, from the Fourth or any other circuit to support this

position. In the en banc decision of the Ninth Circuit, which was affirmed by the Supreme Court in *Desert Palace,* the Ninth Circuit specifically discussed the relationship between the *McDonnell Douglas* burden shifting analysis and the mixed motive analysis. *Costa* v. *Desert Palace, Inc.*, 299 F.3d 838,854-57 (9th Cir. 2002, *affd,* 539 U.S. 90 (2003). In that case, the Court ruled that "McDonnell Douglas and 'mixed motive' are not two opposing type of cases. Rather, they are separate inquiries that occur at separate stages of litigation." *Desert Palace, 299* F,3d at 857. More specifically, the Ninth Circuit found that the McDonnell Douglas burden shifting analysis was the pretrial standard in employment discrimination cases and thus should be applied in Summary Judgment decisions. Id. At 854.

Since the *Desert Palace* case, the Supreme Court has reaffirmed that the proper standard for determining summary judgment in an employment discrimination case is the *McDonnell Douglas* opinion in *Desert Palace,* also wrote the majority opinion in *Raytheon.* In *Raytheon,*

Justice Thomas confirms that the use of the McDonnell Douglas burden shifting analysis is the proper analysis to be used in discrimnaroy treatment cases. Id. At 49 n.3.

The Fourth Circuit addressed the *Desert Palace* case in *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004). In that case, the plaintiff was alleging violations of Title VII, the Age Discrimination in Employment Act (ADEA), and the New York State Human Rights Law. The Fourth Circuit stated that "a plaintiff may avert summary judgment and establish a claim for intentional sex or age discrimination through two avenues of proof." *Id.* at 284. The first avenue, mixed motive analysis, is by

> demonstrating through direct or circumstantial evidence that sex or age discrimination motivated the employer's adverse employment decision. The employee, however, need not demonstrate that the prohibited characteristic was the sole motivating factor to prevail, so long as it was a motivating factor. In such cases, historically referred to as "mixed-motive" cases, it is sufficient for the individual to

> demonstrate that the employer was motivated to take the adverse employment action by both permissible and forbidden reasons.

id. The second avenue is "to proceed under a 'pretext' framework, under which the employee, after establishing a prima facie case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination." *Id.* at 285. This Court is unclear as to the distinction that the plaintiff is trying to make when she says:

> the *[Hill* case upon which the Magistrate bases his determination that Plaintiffs arguments concerning the application of the shifting burden to test race discrimination cases is without merit, is a case in which the Court was evaluating an ADEA claim, as well as a sex-discrimination claim, which explains why the Court would have applied the shifting burden type analysis to those claims.

(Objections p. 2) Title VII provides:

> It shall be unlawful employment practice for an employer-(l) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(l). Title VII clearly covers both race, which is at issue in the instant case, and sex, which was at issue in the *Hill* case. That direct evidence may have been presented or required in *Hill* with regard to the ADEA claim does not negate the fact that sex discrimination was also an issue in that case.

Hill directly defeats the plaintiffs argument that the *McDonnell Douglas* standard of proof is no longer applicable in employment discrimination case at the summary judgment stage of a law suit. Instead, that case seems to support the position that it is still a viable standard of review for this Court at the summary judgment stage. Since *Desert Palace* the Fourth Circuit has implicitly held that the McDonnell Douglas and mixed motive analyses

continue to be valid, but separate alternatives of proof in the Title VII discrimination cases. Hill, 354 F.3d at 284-85; *See Murray v. United Food & Commercial Workers Union*, 100 Fed. Appx. 165 (4th Cir. 2004) (unpublished) (analyzing single-motive/pretext framework claims and mixed motive claims separate where plaintiff proceeded

5 See EEOC v. Warfield-Rohr Casket Co., Inc., 364 F.3d 160, 164, n.1 (4th Cir. 2004) ("We have previously assumed, without deciding, that direct evidence is still a prerequisite for a mixed-motive analysis in ADEA cases. We are not called on to decide that issue because the EEOC has presented direct evidence of discrimination." (internal citations omitted)}.

(under both) *Jonesv. Southcorr*, 324 F. Supp. 2d 765, 775 (M.D.N.C. 2004) (recognizing *Hill's* separate discussion of single-motive and mixed-motive analysis). The Fourth Circuit has stated that:

> [r]egardless of the type of evidence offered as support for [a] discrimination claim (direct, circumstantial, or evidence of pretext, or whether[the plaintiff] proceeds under a mixed motive or single motive theory, "the ultimate question in every

employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."

Murray, 100 Fed.Appx. At 172. Plaintiff's objection that the McDonnell Douglas analysis is improper at the summary judgment stage is without merit.

Ultimate Decision

The defendant also argues that, even if plaintiffs discrimination claim is analyzed under the mixed-motive standard, plaintiff failed to present evidence that defendant's employment decisions were based on her race. The Magistrate Judge analyzed plaintiffs allegations of discrimination under both the *McDonnell Douglas* and the mixed-motive standards of proof:

> Plaintiff may also proceed under the mixed-motive method of establishing intentional discrimination. Under this method, a plaintiff must present sufficient

evidence, direct or circumstantial, that, despite the existence of legitimate, nondiscriminatory reasons for the adverse employment action, an illegal factor (i.e., race) was a motivating factor in the decision. Plaintiff need not show race was the sole motivating factor but only that it was a motivating factor. The facial bias must come from a relevant decision maker. Also, the protected trait "must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome."

Clearly, plaintiffs claim that she was placed on leave without pay was motivated by racial bias is without merit. Plaintiff was not eligible for FMLA leave. Therefore, she was placed on leave under defendant's non-FMLA leave policy. This leave is without pay. There is no evidence to suggest that race played any role in this decision.

Plaintiff also claims intentional discrimination based on defendant's refusing to allow her to return to work with restrictions. She relies on her assertions that defendant allowed other, similarly situated white employees to work

> with restrictions which were at least equally restrictive as plaintiffs restrictions. As discussed above, plaintiff's] comparators were not similarly situated, and, therefore, plaintiff has failed to make a sufficient showing that race played a motivating role in defendant's decision-making.
>
> Plaintiff also claims the termination of her employment was motivated in part by racial bias. It is uncontradicted that defendant's leave of absence policy provided for termination if the employee is unable to return to work after a 12 month period. Plaintiff was not able to return to work within 12 months of taking a leave of absence. However, defendant did not terminate her employment at that time but extended her leave of absence to allow her to transfer to another position that she could perform. Plaintiff failed to do this.

(Report pp. 25-27 (internal citations omitted)) The Magistrate Judge clearly analyzed this case under the mixed-motive analysis in addition to the McDonnell Douglas analysis.

Genuine Issue of Material Fact as to the Fourth Element of Plaintiff s Discrimination Claim

The plaintiff also objects to the Magistrate Judge's finding that the record does not present a genuine issue of material fact as to the fourth element of the plaintiffs race discrimination claim: that other employees who are not members of the protected class were retained under apparently similar circumstances. Plaintiff argues first, that there is a genuine issue of material fact as to whether Powell and the plaintiff were substantially similar and second, that there is a genuine issue of material fact as to whether the defendant's actions raised an inference of discriminatory intent. Defendant contends that the Magistrate Judge did not err.

In order to show *prima-facie* case for race discrimination, the plaintiff must show (1) she is a member of a protected class; (2) she was qualified for her job and her job performance was satisfactory; (3) she suffered an adverse employment action and

(4)other employees who are not members of the protected class were retained under apparently similar circumstances. *Bryant v. Bell Atlantic Maryland, Inc.*, 288 F.3d 124, 133 (4th Cir. 2002). [6] It is this fourth element that is at issue in the instant case as there is no dispute as to the first and third elements and defendant has not objected to the Magistrate Judge's recommendation that there is a genuine question of material fact

6 The required elements of a *prima facie* case of employment discrimination are the same under Title VII and § 1981. *Gairola v. Commonwealth of Va. Dept. of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985).

as to the second element,

Similarly Situated Comparator

Plaintiff submitted in response to defendant's motion for summary judgment that there were

nine (9) other employees who were allowed to return to work with medical restrictions and, therefore, treated more favorably than her. In her objections, plaintiff alleges only that the Magistrate Judge erred in finding that there is no genuine issue of material fact as to whether Debra Powell was substantially similar to the plaintiff.

Plaintiff must establish that "other employees" were similarly situated in all relevant respects; that they "dealt with the same supervisor, [were] subject to the same standards and... engaged in the same conduct without such mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it" *Mitchell v. Toledo Hasp.*, 964 F.2d 577,583 (6th Cir. 1992); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617-18 (7th Cir. 2000); *Stanback v. Best Diversified Products,*

Inc., 180F.3d903,910(8thCir. 1999); *Shumway v. United Parcel Serv., Inc.*, 188R3d60, 64 (2d Cir. 1997).

Ms. Powell was a unit secretary for the defendant for fifteen (15) years. She worked in all units, including 4-South and 2-South, the two (2) in which the plaintiff worked. Powell had to do a good bit of walking, mostly to find nurses and technicians who were wanted on the phone, as unit secretary. Ms. Powell testified that she would have to find someone ten (10) to fifteen (15) times a day on a busy day, but would never venture more than seven (7) or eight (8) car lengths from her duty station.

In April of 1999, Powell suffered a non work-related back injury. She was initially out of work from April 7 through 16. Because she was eligible for leave under the FMLA, all of her absences were classified as personal medical leave. On May 4,1999, Powell had an epidural steroid injection in her back. Following this injection, her physician released her to work four (4) hours per day with a restriction of no heaving repetitive lifting or bending.

Beginning June 9,1999, Ms. Powell took a personal medical leave of absence in order to have back surgery and remained out of work until August 2,1999, at which time she was released to return to work with no restrictions. On August 30, 2000, Ms. Powell was severely injured in a recreational vehicle accident and was hospitalized for eleven (11) days. Because she was eligible for FMLA leave, she was placed on personal medical leave of absence effective August 30,2000. Powell was released to return to work without restriction on November 20, 2000.

The job description for unit secretary requires the ability to lift up to fifty (50) pounds occasionally. As noted by the magistrate Judge, Powel's medical restriction did not prohibit the lifting of up to fifty (50) pounds, but restricted repetitive lifting of such weight. From this alone, the restrictions on returning to work are dissimilar and , therefore, Ms. Powell is not a proper comparator for purposes of Title VII. Ms. Powell's restrictions on their face id not conflict with job specifications.

Ms. Powell's physician released her to work on a reduced work schedule and she was allowed to work on *a* reduced schedule pursuant to the FMLA. However, plaintiff s physician did not release her to work on a reduced schedule. Additionally, plaintiff was on non-FMLA leave[7] while Ms. Powell was on FMLA leave. Unlike plaintiff, Ms. Powell was released to return to work with restrictions after less than one (1) month and without any restrictions after four (4) months. Plaintiff, on the other hand, was unable to return to work involving any standing or walking for a period of approximately six (6) months. Consequently, plaintiff has failed to present sufficient evidence to

7 Plaintiff had not worked 1250 hours in the 12-month period preceding her leave and therefore, was not eligible for FMLA leave.

Establish an issue of fact as to whether or not she and Ms. Powell were similarly situated.

Inference of Discriminatory Intent

Plaintiff argues that she has established facts from which an inference of discrimination may be taken. She alleges that:

> Plaintiff presented several different arguments, supported by the record, to show that the Defendant treated Plaintiff differently from her white co-workers, based on her race, both in general, at work, and specifically, in the matter at issue. Plaintiff testified to a patter of disparate treatment over her many years of service at McLeod. Testimony from Defendant's witnesses concerning job duties of a Unit Secretary were contradictory, when applied to the Plaintiff. There is evidence that Defendant did not abide by its own policies requiring them to make every effort to return Plaintiff to return to work.. . . The Judge failed to address the fact that at least one person was allowed to use the motorized scooter accommodation at work, which Defendant claimed was impossible for plaintiff.

(Objections pp. 4-5)

The plaintiff cites a Maryland District Court for the proposition that "the Court must examine instances of discriminatory treatment holistically and not atomistic ally." *See Settle v. Baltimore County,* 34 F. Supp. 2d

969, 985 (D. MD. 1999). The entire quote in *Settle* is:

> [W]hile it is certainly true that a court should examine instances of alleged discriminatory treatment holistically and not atomistic ally, *see Cook v. CSX Trans. Corp.*, 988 F.2d 507, 512 (4th Cir. 1993) ("[Tjo focus on one piece of the record without considering the whole would distort the permissible inferences to be drawn.")) this does not mean that evidence of a large number of merit less claims (or non-cognizable allegations) attains probative value when such claims are aggregated. To the contrary, in the absence of direct or circumstantial evidence of discriminatory intent, careful analysis of claims of disparate treatment in accordance with the w ll settled *McDonnell Douglas* paradigm is absolutely required.

Id.

Plaintiff's allegation that the Magistrate Judge "failed to address the fact that at least one person was allowed to use the motorized scooter accommodation at work, which Defendant claimed was impossible for Plaintiff." (Objections p. 5) The plaintiff does not tell this Court in her objections

who that individual is. From a review of the pleadings, it appears that plaintiff is referring to Anthony, a volunteer at the Hospital who is in a motorized wheelchair permanently. The Court notes that in the Report, the Magistrate Judge lists as an individual who the plaintiff asserts was retained under similar circumstances. The Report concludes that "[o]f the employees listed By the plaintiff as treated disparately, only Debra Powell and Detra Leake worked with or reported to the same supervisor. Plaintiff does not contest this." (Report p. 17) Consequently, plaintiff s assertion that the Magistrate Judge did into address that another individual was allowed to use a motorized wheelchair is without merit. The Magistrate Judge considered Anthony, but did not include him in the final analysis because he was not similarly situated because he was not supervised by the same person as the Plaintiff.

Plaintiff testified that she observed Anthony coming onto the floor where she works in the motorized

wheelchair. in her memo plaintiff states:

> While he may not, as a volunteer, have been substantially similar to the Plaintiff (he did not have the same supervisor), his presence in the nursing hall, using a motorized scooter or wheelchair, is far from insignificant to this case as evidence of pretext... . The assertion that the use of a motorized wheelchair as an accommodation can not be allowed by McLeod is rebutted by the fact that Anthony, regardless of his status (volunteer or employee) is allowed to use one in the same area. He and Plaintiff are substantially similar based on the fact that they both would be using a motorized wheelchair to move from one place to another on the hall where, according to the Defendant, it was prohibited.

(Plaintiffs Response to Defendant's Motion for Summary Judgment pp. 34-35)

As discussed more fully above and in the Report, plaintiff must establish that "other employees" were similarly situated in all relevant respects; that they "dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct

without such mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612,617-18 (7th Cir. 2000); *Steinbeck. Best Diversified Products, Inc.*, 180 F3d 903,910 (8th Cir. 1999); *Shumway* v. *United Parcel Serv., Inc.*, 188 F.3d 60, 64 (2d Cir. 1997). Plaintiff admits that Anthony did not have the same supervisor and were, therefore, not similarly situated. However, she also appears to argue that because they both would be using a motorized vehicle they would be similarly situated. This assertion runs contrary to the case law and plaintiff has presented this Court with no case law to support the assertion that a comparator can be similarly situated when not supervised by the same person. Additionally, there has been no evidence submitted that Anthony was required to go into the same areas as the plaintiff to establish that they are substantially similar.

Conclusion

I find as a matter of law that there are no genuine issues of material fact and defendant is entitled to summary judgment as a matter of law. For the foregoing reasons, the undersigned overrules all objections, adopts the Report and Recommendation of the Magistrate Judge, incorporates it herein by reference, and **GRANTS** the defendants' motion for summary judgment.

AND IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Court Judge
April 29, 2005 Florence, South Carolina

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UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-1601

THUMBELINA BROWN,

Plaintiff - Appellant, versus

MCLEOD REGIONAL MEDICAL CENTER OF THE PEE DEE, INC.,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, District Judge. (CA-02-3973-4)

Submitted: January 3, 2006 Decided: January 25, 2006

Before MICHAEL, TRAXLER, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Chalmers C. Johnson, Charleston, South Carolina, for Appellant. Charles E. McDonald, III, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Thumbelina Brown sues her former

employer, McLeod Regional Medical Center of the Pee Dee, Inc. (McLeod) , for race discrimination in her employment, in violation of Title VII and section 1981. The district court granted summary judgment to McLeod, and Brown appeals. We affirm for the reasons stated below.

I

Brown, an African-American woman, began working as a nursing assistant at the McLeod Gynecology and Obstetrics Unit in 1978. She moved to the position of unit secretary in 1998. On or around May *26,* 2000, Brown broke her ankle in a car accident and underwent surgery. She requested a leave of absence after her surgery because she was unable to return to work. In response, McLeod requested that Brown's doctor complete a "Medical Certification." McLeod also

provided Brown with notice of her Family and Medical Leave Act (FMLA) rights and directed her to contact the McLeod Human Resources Office about short-term disability benefits. On June 12, 2000, Dr. Angus McBryde completed Brown's medical certification, which indicated that Brown could not return to work for at least three months. On July 17 McLeod notified Brown that her request for a medical leave of absence was approved but that the leave did not qualify for FMLA protection. On August *14* Dr. McBryde completed a second medical certification, which indicated that Brown could return to work provided she was not required to stand or walk. Dr. McBryde wrote a note on November 22 indicating that Brown could return to work with three restrictions: she spend no more than ten minutes per hour on her feet, she spend no more than five minutes per hour walking, and she refrain from kneeling, bending, or carrying anything over three to four

pounds during the time on her feet. Although Brown was ready to return to work, McLeod determined that Brown could not perform the essential functions of the unit secretary position with these restrictions; thus McLeod did not let her return.

solution because it would not fit in all areas pertinent to the job.

McLeod's leave of absence policy provides that employees who remain on leave for twelve months without returning to work are subject to termination. Brown's leave reached twelve months on May 26, 2001. However, McLeod extended Brown's leave so that she could look for another position at McLeod where her restrictions could be accommodated. McLeod asserts that it made several attempts to contact Brown by phone about other job opportunities at McLeod that might meet her restrictions, but that Brown never responded. Brown does not deny this

assertion. McLeod terminated Brown's employment on September 1, 2001.

Brown sued McLeod, alleging discrimination on the basis of race, in violation of Title VII, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. On April 29, 2005, upon the recommendation of the magistrate judge, the district judge entered summary judgment for McLeod. Brown appeals.

II

Brown argues that the district court erred in using the Title VII burden shifting test, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), because Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), requires mixed-motive analysis, see Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), in all Title VII cases at summary judgment. We recently rejected this argument in

Diamond V. Colonial Life & Accident Insurance Co., 416 F>3d 310, 317 (4th Cir. 2005).

that the district court did not err in determining that there is no genuine issue of material fact as to whether Powell and Brown were similarly situated. Because Brown cannot establish a prima facie case of discrimination, McLeod is entitled to summary judgment.

III.

For the foregoing reasons, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

(2)

No. 06-16

FILED

JUL 31 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THUMBELINA BROWN,

Petitioner,

v.

McLEOD REGIONAL MEDICAL CENTER OF THE PEE DEE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant certiorari to review the Fourth Circuit Court of Appeals' decision affirming the decision of the United States District Court For The District Of South Carolina in Petitioner's case of alleged race discrimination, where the Petitioner failed to present evidence that raises a material question of fact to support her prima facie case of discrimination?

CORPORATE DISCLOSURE STATEMENT

Respondent, McLeod Regional Medical Center, is a private wholly owned subsidiary of McLeod Health.

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STATEMENT OF THE CASE

Petitioner filed suit in the Court of Common Pleas in Florence, South Carolina, on October 29, 2002. The Complaint included a claim for race discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. Respondent removed the case to The United States District Court For The District of South Carolina on November 25, 2002, and subsequently filed a timely Answer. McLeod filed a motion for summary judgment on April 25, 2004, that was granted by the district court on April 29, 2005, dismissing the case with prejudice. Petitioner filed a Notice of Appeal on May 22, 2005, and the Fourth Circuit Court of Appeals affirmed the decision of the district court by Order dated January 25, 2006. (copy attached).[1]

STATEMENT OF THE FACTS

McLeod is a regional healthcare system located in Florence, South Carolina. McLeod hired Brown on September 12, 1978, as a Nursing Assistant in the Obstetrics and Gynecology Units of the Hospital. After suffering an injury to her back in the mid-1980s, McLeod allowed Brown to transfer to the position of Unit Secretary in October 1988.

Brown broke her ankle on or about May 24, 2000, in an automobile accident. Following surgery to her ankle, Brown was unable to return to work and requested a leave of absence. Brown's supervisor, Hart Smith, sent her a memorandum

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1. The Orders contained in the Appendix to the Petition For Writ Of Certiorari are incomplete copies, so Respondent included a complete copy of the Fourth Circuit Court of Appeals Order for the convenience of the Court.

addressing her need for a leave of absence. Dr. Angus McBryde completed a medical certification on June 12, 2000, which stated that Brown could not return to work and would be unable to return to work for approximately three months or longer. Natalie Lynch, McLeod's Human Resources Assistant, sent Brown a letter dated July 17, 2000, in which she was informed that her request for a medical leave of absence was approved beginning May 26, 2000. Brown was further informed that her leave did not qualify for FMLA protection and that before she could return to work from her leave of absence, she would need to coordinate her return with representatives from the Human Resources Department.

Brown took medication for about one month and did physical therapy for about two months in an effort to help her recovery. However, on August 14, 2000, Dr. McBryde completed another medical certification form indicating that Brown could do no standing or walking. Brown's physical limitations included "no standing or walking," and the duration of the incapacity was indefinite. Brown returned to Dr. McBryde for a follow-up visit on November 22, 2000. Brown explained to Dr. McBryde that it was necessary for her to perform walking as part of her job. Dr. McBryde released Brown to return to work with certain physical restrictions, including: "(1) no more than ten minutes per hour on her feet, (2) no more than five minutes walking per hour (this is included in number 1), and (3) should not carry anything over three to four pounds during the minimum time on her feet." After reviewing these restrictions, McLeod determined that Brown could not perform the essential functions of the Unit Secretary position with the restrictions that had been placed on her by Dr. McBryde.

Brown saw Dr. McBryde again on March 19, 2001, and Dr. McBryde again provided Brown with a note releasing her to return to work effective April 14, 2001. Dr. McBryde's note indicted that Brown should limit standing and walking as much as possible. Upon receiving this office note from Dr. McBryde, McLeod requested more specific information regarding the amount of walking and standing that Brown could do within his restrictions. In light of McLeod's request, Dr. McBryde completed a medical certification form on April 9, 2001, stating that the physical restriction on Brown was "no standing and walking as part of the job." As a result of these restrictions, Brown was not able to return to work at McLeod at that time. Brown met with Hart Smith, her supervisor, and two benefits specialists of McLeod, Miriam Carter and Pam Erwin, in order to discuss her doctor's most recent restrictions.

Following their meeting, Carter, Smith, and Erwin were unable to determine if Brown was capable of returning to work with Dr. McBryde's restrictions. Carter contacted John Zelenka, McLeod's Work Recovery Manager, and asked him to perform a worksite evaluation to determine if Brown could perform the essential functions of the Unit Secretary position with her current restrictions. Zelenka evaluated the physical requirements of the Unit Secretary position to determine whether Brown could perform the essential functions of her job. Zelenka interviewed Smith and another Unit Secretary and personally observed a Unit Secretary performing the job duties to determine the amount of time spent walking and standing in performing the duties of the Unit Secretary. Zelenka determined that based on his review of the physical requirements of the job, Brown could not perform the functions of the Unit Secretary position while adhering to the restrictions placed on her by Dr. McBryde. Zelenka was

then asked by Carter to determine whether there were any reasonable accommodations that could be made to allow Brown to perform her job as a Unit Secretary. Zelenka contacted Dr. McBryde's office, and they suggested the use of a motorized scooter. Zelenka, however, determined that the scooter would not fit in all areas pertinent to Brown's job and would not be allowed in certain areas because of space limitations.

Under McLeod's leave of absence (non-FMLA leave) policy, employees who remain on leave for 12 months without returning to work are subject to termination. As of May 26, 2001, Brown had been on leave for 12 months and had not yet been able to return to her Unit Secretary position. However, because of McLeod's efforts to provide an accommodation to Brown, her employment was not terminated after 12 months of leave. Instead, McLeod decided to give Brown an opportunity to transfer to another position at McLeod that met her physical restrictions. This would allow her to remain employed with McLeod.

Rather than immediately terminating her employment after she exceeded the 12-month maximum leave time, McLeod provided Brown time to locate another position that would fit her medical restrictions. Carter arranged for Brown to meet with a recruiter to locate a job to which Brown could transfer that would meet her medical restrictions. Carter explained that Brown had 60 days to find another position to which she could transfer. Carter specifically explained to Brown that she would be terminated if she did not transfer to another position at McLeod within that 60-day time period. Carter contacted Brown on three separate occasions to inform her that McLeod had positions available that might meet her restrictions and that Brown needed to contact the recruiter

immediately regarding these positions. However, after her initial meeting, Brown never applied for any transfer and never made any further contact with representatives of McLeod to discuss the possibility of transferring to another position. As a result of her failure to transfer to another position at McLeod within the 60 days, Brown's employment with McLeod was terminated effective September 1, 2001.[2]

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Satisfy This Court's Requirements For Granting Certiorari.

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Rule 10 lists the following examples of the types of cases in which the Court may grant certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to the call for an exercise of this Court's supervisory power;

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2. Brown had an office visit with Dr. McBryde on August 31, 2001. His notes indicate that Brown would be unable to carry out the full workload of her job duties for an indefinite period of time, but "estimated at least six months." McLeod had already provided Brown a three-month leave extension.

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important issue of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Conversely, Rule 10 expressly states that a "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Brown's petition should be denied because there are no "compelling reasons" for granting certiorari in this case. This case does *not* involve (1) a conflict among the United States courts of appeals, (2) a conflict between a United States court of appeals and a state court of last resort, (3) a conflict on an important federal question among state courts of last resort, or (4) a conflict between this Court's decisions and the decisions of lower courts. Rather, this case involves nothing more than a claim of alleged employment discrimination. Moreover, the asserted error in this case consists of nothing more than allegations of erroneous factual findings or general misapplication of the law. Those are precisely the types of allegations that Rule 10 provides are not appropriate for certiorari. Accordingly, the petition for writ of certiorari should be denied.

II. The Petition Fails On The Merits.

A. The Burden-Shifting Analysis Remains Appropriate In Employment Discrimination Cases.

The Fourth Circuit has consistently taken the position that *post-Desert Palace*,[3] the ultimate question remains whether the plaintiff in an employment discrimination case is a victim of intentional discrimination. *See Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277 (4th Cir. 2004) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 520 U.S. 133, 153 (2000)). Petitioner argues that *post-Desert Palace*, all Title VII cases require mixed-motive analysis at the summary judgment stage of the proceedings. The Fourth Circuit Court of Appeals rejected this argument consistent with its recent decision in *Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310, 317 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1033 (2006).

In *Diamond*, the Court of Appeals was presented with the same legal argument and found the argument meritless. The Court of Appeals in *Diamond* affirmed the district court's order granting Colonial summary judgment on Diamond's claims of race discrimination in violation of Title VII and 42 U.S.C. § 1981. *Diamond*, 416 F.3d at 312-13. In rejecting Diamond's argument, the Court of Appeals specifically held as follows:

> Diamond argues that the *Desert Palace* holding means that all employment discrimination cases should be analyzed as mixed-motive cases and that Title VII plaintiffs can survive summary judgment

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3. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

> simply by presenting a "prima facie case." She further argues that our en banc decision in *Hill* recognized this dual effect of *Desert Palace*. These arguments are meritless.

Id. at 317-18 (footnote omitted). The *McDonnell Douglas* burden-shifting standard is still the appropriate standard in reviewing a motion for summary judgment in Title VII employment discrimination cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

> Notwithstanding our clear recognition in *Hill* of these principles and the continued vitality of the *McDonnell Douglas* framework, Diamond insists that after *Desert Palace* that framework is "no longer a tool which can be used to dismiss a Title VII case at the [s]ummary [j]udgment stage." Her argument finds no support in the text of *Desert Palace*, which does not even mention *McDonnell Douglas*. Moreover, since deciding *Desert Palace*, the Supreme Court has continued to invoke the burden-shifting framework in pretext cases. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513, 517 n.3, 518 (2003); *see also Johnson v. California*, . . . 125 S. Ct. 2410, 2418 n.7 . . . (2005). Our sister circuits have also rejected the view that *Desert Palace* nullified the *McDonnell Douglas* framework. *See, e.g., Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir. 2005); *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1018 (8th Cir. 2005); *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004).

Diamond, 416 F.3d at 318-19. Brown's argument that the Court Of Appeals erred in applying the *McDonnell Douglas*

burden-shifting test in granting McLeod summary judgment is unfounded.

Additionally, the Court of Appeals correctly concluded that regardless of the method of analysis applied, summary judgment was appropriate in this case. "Regardless of whether Brown alleges that race was a motivating factor or the sole reason for McLeod's actions, McLeod is entitled to summary judgment because Brown has failed to show there is a genuine issue of material fact as to whether McLeod intentionally discriminated against her on the basis of race." (Order at 5.) Even when Plaintiff's claims are reviewed using the mixed-motive analysis, McLeod was properly granted summary judgment in this case.

B. Petitioner Failed To Demonstrate The Fourth Element Of Her Prima Facie Case.

Brown alleges that the record contains genuine issues of material fact regarding her allegations of race discrimination. "Brown (who is African American) essentially claims that white workers with restrictions as severe as or more severe than hers have been allowed to return to work with those restrictions, where she was not." (Petition For Writ at 14.) Despite her contentions, the Court of Appeals correctly concluded that Brown failed to present any evidence from which a court could conclude that a genuine issue of material fact remained for trial. Brown failed to establish the fourth element of her prima facie case.

The Court of Appeals correctly concluded that Plaintiff failed to produce evidence of similarly situated employees who were not members of the protected class who were retained. (Order at 5.) The Court of Appeals correctly

concluded that Debra Powell and Brown were not similarly situated because: (1) Powell was on FMLA leave while Brown was not, and (2) Powell was released to return to work with minor restrictions after less than one month and released without restrictions after four months, while Brown was released only with significant restrictions. Brown was never released without restrictions as Powell. (Order at 5-6.) Because Brown failed to carry her burden of establishing a prima facie case of race discrimination, McLeod was properly awarded summary judgment.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JANUARY 25, 2006

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-1601

THUMBELINA BROWN,

Plaintiff-Appellant,

versus

MCLEOD REGIONAL MEDICAL CENTER OF THE PEE DEE, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, District Judge. (CA-02-3973-4)

Submitted: January 3, 2006 Decided: January 25, 2006

Before MICHAEL, TRAXLER, and DUNCAN, Circuit Judges.

Appendix

PER CURIAM:

Thumbelina Brown sues her former employer, McLeod Regional Medical Center of the Pee Dee, Inc. (McLeod), for race discrimination in her employment, in violation of Title VII and section 1981. The district court granted summary judgment to McLeod, and Brown appeals. We affirm for the reasons stated below.

I.

Brown, an African-American woman, began working as a nursing assistant at the McLeod Gynecology and Obstetrics Unit in 1978. She moved to the position of unit secretary in 1998. On or around May 26, 2000, Brown broke her ankle in a car accident and underwent surgery. She requested a leave of absence after her surgery because she was unable to return to work. In response, McLeod requested that Brown's doctor complete a "Medical Certification." McLeod also provided Brown with notice of her Family and Medical Leave Act (FMLA) rights and directed her to contact the McLeod Human Resources Office about short-term disability benefits. On June 12, 2000, Dr. Angus McBryde completed Brown's medical certification, which indicated that Brown could not return to work for at least three months. On July 17 McLeod notified Brown that her request for a medical leave of absence was approved but that the leave did not qualify for FMLA protection. On August 14 Dr. McBryde completed a second medical certification, which indicated that Brown could return to work provided she was not required to stand or walk. Dr. McBryde wrote a note on November 22 indicating that Brown could return to work with three restrictions: she

spend no more than ten minutes per hour on her feet, she spend no more than five minutes per hour walking, and she refrain from kneeling, bending, or carrying anything over three to four pounds during the time on her feet. Although Brown was ready to return to work, McLeod determined that Brown could not perform the essential functions of the unit secretary position with these restrictions; thus McLeod did not let her return.

Several months later, in April 2001, Dr. McBryde completed another medical certification, which indicated that Brown could return to work with the restriction of "no standing or walking as part of the job." J.A. 311. McLeod again did not allow Brown to return to work. Soon thereafter, McLeod Work Recovery Manager John Zelenka performed a work site evaluation to determine if Brown could perform the essential functions of the unit secretary position with the restrictions Dr. McBryde placed on her. After talking to Dr. McBryde, interviewing other unit secretaries, and observing a unit secretary perform the job, Zelenka concluded that Brown could not perform the essential job functions. Zelenka also considered whether Brown could perform her job with a motorized scooter, but concluded that the scooter was not a viable solution because it would not fit in all areas pertinent to the job.

McLeod's leave of absence policy provides that employees who remain on leave for twelve months without returning to work are subject to termination. Brown's leave reached twelve months on May 26, 2001. However, McLeod extended Brown's leave so that she could look for another position at McLeod where her restrictions could be

accommodated. McLeod asserts that it made several attempts to contact Brown by phone about other job opportunities at McLeod that might meet her restrictions, but that Brown never responded. Brown does not deny this assertion. McLeod terminated Brown's employment on September 1, 2001.

Brown sued McLeod, alleging discrimination on the basis of race, in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. On April 29, 2005, upon the recommendation of the magistrate judge, the district judge entered summary judgment for McLeod. Brown appeals.

II.

Brown argues that the district court erred in using the Title VII burden shifting test, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), requires mixed-motive analysis, *see Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in all Title VII cases at summary judgment. We recently rejected this argument in *Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310, 317 (4th Cir. 2005). Regardless of whether Brown alleges that race was a motivating factor or the sole reason for McLeod's actions, McLeod is entitled to summary judgment because Brown has failed to show that there is a genuine issue of material fact as to whether McLeod intentionally discriminated against her on the basis of race. *See id.* at 319.

Brown argues that the district court erred in concluding that she had failed to establish a genuine issue of material

fact on the fourth element of her prima facie case for race discrimination: that other similarly situated employees who are not members of the protected class were retained. *See, Bryant v. Bell Atlantic Md., Inc.*, 288 F.3d 124, 133 (4th Cir. 2002). Specifically, Brown alleges that the court erred in finding no genuine issue of material fact as to whether Debra Powell, a white employee, was in a situation similar to Brown's. Although both employees took leaves of absence, they are not similarly situated because Powell was on FMLA leave while Brown was not. Furthermore, Powell was released to return to work with minor restrictions after less than one month and returned to work without restriction after four months. Brown, however, was released to work after three months, but only with significant restrictions. At no point was Brown released to work without restriction. We therefore conclude that the district court did not err in determining that there is no genuine issue of material fact as to whether Powell and Brown were similarly situated. Because Brown cannot establish a prima facie case of discrimination, McLeod is entitled to summary judgment.

III.

For the foregoing reasons, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED